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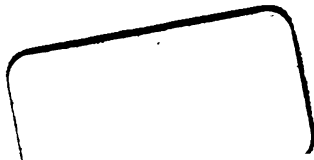
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF MONTANA.

FROM JULY 11, 1905, TO FEBRUARY 26, 1906.

OFFICIAL REPORT.

VOLUME 33.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1907.

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BY

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Rec. May 23, 1907

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THE FILMER BROTHERS ELECTROTYPE COMPANY,
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The opinions in this volume of the Montana Reports have been edited and are reported, under the supervision of the Justices, by Mr. A. C. Schneider, a member of the bar of the supreme court.

When this volume was nearing completion and when it was hoped that it would be in the hands of the profession no later than June 1, 1906, the entire plant of the publishers was destroyed by the San Francisco fire in April of that year. The difficulties encountered by the firm in securing a suitable location and in reassembling a plant commensurate with its needs, prevented the reprinting of the volume until the middle of October last, since which time work on it has progressed uninterruptedly and as rapidly as possible. Barring accidents, it is believed that Volume 34 will be ready for delivery on April 15, 1907.

(iii)

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OF
THE SUPREME COURT OF THE STATE OF MONTANA,
DURING THE TIME OF THESE REPORTS.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. GEORGE R. MILBURN, THE HON. WILLIAM L. HOLLOWAY,	}	Associate Justices.
--	---	---------------------

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EDGAR M. HALL, Second Asst. Attorney General.

JOHN T. ATHEY, Clerk.

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Officers of Teton County (County Seat, Chouteau)—County
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Counties of Chouteau and Valley.

District Judge, Hon. John W. Tattan.

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Officers of Valley County (County Seat, Glasgow)—County
Attorney, J. L. Slattery, Esq.; Clerk of District Court, C. C.
Beede; Sheriff, S. C. Small.

ERRATA.

For "*Ayotte v. Nadeau*," on page 28, line 6 from top of page,
read "*Osmers v. Furey*, recently decided, 32 Mont. 581."



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SUPREME COURT RULES.

For Rules of the Supreme Court of the State of Montana, promulgated February 1, 1905, see Vol. XXX, Montana Reports, page xxix.

AMENDMENT OF THE RULES OF THE SUPREME COURT.

It is ordered that Rule IX of the Rules of this Court be amended in paragraph 1 thereof by striking out the words "and criminal" and transposing the words "cases" and "civil" in the first line of said paragraph 1, so that as amended the paragraph shall read:

IX.

SERVICE AND FILING OF TRANSCRIPTS.

1. In all civil cases, the transcript shall be filed, and a copy thereof served upon the adverse party or his attorney within five days after the filing of the same, and if there be more than one adverse party appearing by different attorneys, on each party or the attorney of each party so appearing. (Promulgated December 22, 1906.)

CASES DETERMINED
 IN THE
SUPREME COURT
 AT THE
JUNE TERM, 1905.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. GEORGE R. MILBURN,
 THE HON. WILLIAM L. HOLLOWAY,

} Associate Justices.

PIRRIE, RESPONDENT, v. MOULE ET AL., DEFENDANTS;
 MOULE, APPELLANT.

32	1
34	370
33	1
38	423

(No. 2,115.)

(Submitted June 14, 1905. Decided July 11, 1905.)

Appeal Bonds—Sufficiency—Curing Defects.

Undertaking on Appeal—Appeal from More than One Order.

1. *Held*, that, though a single undertaking in the sum of \$300 is sufficient to sustain an appeal from a judgment and from an order denying a new trial, when treated as one appeal, where appeals are taken from a judgment and from any order other than one denying a new trial, or from more than one order, a separate undertaking in the sum of \$300 must be filed for each, or, if both are included in the

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same paper, appropriate references must be made to show which appeal each is intended to effectuate, even though one of the orders appealed from may be a nonappealable order.

Undertaking on Appeal—When Void and not Susceptible of Amendment.

2. Where a single undertaking on appeal in the sum of \$300 was filed to support separate appeals from a final judgment, from an order denying a new trial, and from a special order after judgment, overruling the defendant's exceptions to the findings of fact and conclusions of law made by the court, instead of a separate bond for each appeal, the undertaking was wholly void for ambiguity, and not merely insufficient, and hence could not be cured under section 1740 of the Code of Civil Procedure, providing that no appeal shall be dismissed for insufficiency of the undertaking if a good and sufficient undertaking, approved by a justice of the supreme court, be filed therein before the hearing on motion to dismiss the appeal.

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

ACTION by George Pirrie against P. I. Moule and others. From a final judgment in favor of plaintiff, and from an order denying a new trial, and from a special order after judgment, overruling exceptions filed by defendant Moule to the findings of fact and conclusions of law made by the court, he appeals. Dismissed.

Messrs. McConnell & McConnell, and Mr. Lewis Penwell, for Appellant.

Messrs. Walsh & Newman, and Mr. Rudolph Von Tobel, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The purpose of this action is to obtain a decree quieting plaintiff's title to the use of certain of the waters of Swimming Woman Creek, in Fergus County. It was removed to this court by appeals by the defendant, P. I. Moule, from a final judgment and an order denying a new trial, and also from a special order after judgment "overruling and denying the exceptions filed by the defendant, P. I. Moule, to the findings of fact and conclusions of law made by the court," etc. At the

hearing on the merits a motion was submitted asking that the appeals be dismissed on the ground, among others, that the undertaking on appeal is void for ambiguity, and hence that this court has no jurisdiction, for that, whereas there are three appeals, the undertaking is in the sum of \$300 only, and it is impossible to determine from the recitals therein to which appeal it refers.

The form of the undertaking is the same as that quoted in *Creek v. Bozeman Waterworks Co.*, 22 Mont. 327, 56 Pac. 362. Counsel for appellant has filed an elaborate brief in opposition to the motion, in which he takes exception to the former decisions of this court which construe sections 1724, 1725, 1731, and 1740 of the Code of Civil Procedure, and also those of the supreme court of California construing like provisions, insisting that they are founded upon an erroneous interpretation of the term "insufficient," as used in section 1740, *supra*. The argument is that this term is broad enough to include a void undertaking as well as one not so defective as to be void, invoking the rule of interpretation that the words of a statute are to be construed in their ordinary and popular sense, unless the intention is manifest that they are used in a different sense. It is argued that under section 1740 a good and sufficient undertaking may be substituted for a void one so as to save the appeal, provided the substitution be made as permitted by that section. This argument is plausible. But it must not be overlooked that section 1740 is to be construed in connection with sections 1724, 1725, and 1731. Under section 1724 the appeal, though the procedure provided therein is followed, is ineffectual for any purpose unless, within five days after service of notice, an *undertaking* is filed, etc. So the word "undertaking" is used in sections 1725 and 1731. Now, a void undertaking is nothing—a mere nullity. If the legislature intended the term "insufficient" to be understood as contended for by appellant, the result would be that the appeal would fail if no written paper purporting to be an undertaking should be filed; but if a writing purporting to be

such be filed, this would give this court jurisdiction, and the appeal would be saved by the substitution provided for in section 1740.

Owing to some remarks in *Morse v. Callantine*, 19 Mont. 87, 47 Pac. 635, and the decision in *Watkins et al. v. Morris et al.*, 14 Mont. 354, 36 Pac. 452, which latter was approved and followed in *Ramsey v. Burns et al.*, 24 Mont. 234, 61 Pac. 129; *Helena & Livingston Smelting & Reduction Co. v. Lynch*, 24 Mont. 241, 61 Pac. 1134; *Mahoney v. Butte Hardware Co.*, 24 Mont. 242, 61 Pac. 1134; *Boucher v. Barsalou et al.*, 24 Mont. 242, 61 Pac. 1134; *Teague v. Caplice Co.*, 24 Mont. 242, 61 Pac. 1134; *Nolan v. Montana Central Ry. Co.*, 24 Mont. 327, 61 Pac. 880; and perhaps other cases—this court seems not to have been always entirely consistent in the application of these provisions.

The undertaking filed in the district court in the case of *Morse v. Callantine* was the same in form as the one now under consideration. It will be observed that this court refused to consider its validity because it was not challenged by a motion to dismiss the appeals. The court then proceeded to discuss it briefly, and stated that it was not absolutely void, but that a substitution might have been made of a new undertaking under the provisions of section 1740. *Spreckels v. Spreckels*, 114 Cal. 60, 45 Pac. 1022, and *Watkins v. Morris*, *supra*, are cited as supporting this view. But an examination of these cases will show that neither is in point. If the question was not before the court, the remarks referred to are *dicta*, and therefore are not authority. If the question was before the court, the decision, in so far as it held the undertaking defective and not void, is manifestly erroneous, as has been repeatedly pointed out in the decisions of this court hereinafter cited. This case and the case of *Watkins v. Morris* are cited and discussed in *Creek v. Bozeman Waterworks Co.*, *supra*, and the distinctions between an undertaking wholly void and one defective, and therefore amendable, are clearly pointed out. As was said in *Ramsey v. Burns*, the rule of the case of *Wat-*

kins v. Morris is illogical; and so it is. It was nevertheless upheld, because it had so long been observed that an abrogation of it would result in great hardship to litigants. The case of *Baker v. Butte City Water Co.*, 24 Mont. 31, 60 Pac. 488, is also cited and expressly approved.

The result of these cases is that one undertaking in the sum of \$300 will support appeals from a judgment and an order denying a new trial, when treated as one appeal. When treated as distinct appeals, as in *Baker v. Butte City Water Co.*, they will be so considered, and the undertaking must contain alternative conditions referring to each. In case of appeals from a judgment, and any other order than one denying a new trial, or from more than one order, a separate undertaking in \$300 must be filed for each, or, if both are included in the same paper (section 1731) appropriate references must be made, so that it may be understood which appeal each is intended to effectuate.

In *Ramsey v. Burns* the application of the rule of the *Watkins Case* is limited to such cases only as fall strictly within it. In all the other cases decided by this court, beginning with *Creek v. Bozeman Waterworks Co.*, the term "insufficient" has been taken to mean merely defective, and not void, and undertakings not containing appropriate references to the separate appeals have been declared void for ambiguity. (*Murphy v. Northern Pac. Ry. Co.*, 22 Mont. 577, 57 Pac. 278; *Washoe Copper Co. v. Hickey et al.*, 23 Mont. 319, 58 Pac. 866; *Grage v. Paulson*, 23 Mont. 337, 59 Pac. 1; *Coleman v. Perry et al.*, 24 Mont. 237, 61 Pac. 129; *Richter v. Eagle Life Assn.*, 24 Mont. 346, 61 Pac. 878; *Hurley v. O'Neill*, 24 Mont. 293, 61 Pac. 658; *Hahn v. James et al.*, 26 Mont. 50, 66 Pac. 463; *Frary v. Dwyer*, 26 Mont. 414, 68 Pac. 1133; *Hayes v. Union Mercantile Co. et al.*, 27 Mont. 264, 70 Pac. 975.)

The rule of these cases is supported by the provision of the Constitution which declares that the appellate jurisdiction of this court is subject to such limitations and regulations as may be prescribed by law. (Const., Art. VIII, sec. 3.) Construc-

ing all the sections of the statute and the constitutional provision together, the term "insufficient," as applied to an undertaking on appeal, must therefore be construed as meaning such a one as has some efficiency, but not enough to meet the necessary requirements. As used in other sections of the Code of Civil Procedure (Sections 1152, 1173), the terms "insufficient," "insufficiency," and "insufficiently" are used in a sense broad enough to include "total absence" or "entire want of," but as used here it bears its ordinary meaning—"not enough" (Webster's International Dictionary; Century Dictionary); that is, importing degree in quantity or quality, and not total absence. Adopting this as the correct definition under the provisions of section 1740, *supra*, when the undertaking is insufficient a new one may be filed, and the appeal, or appeals, be saved; but when the one filed is void, the court has not obtained jurisdiction, and the appeals must fail.

Prior to the submission of the motion herein, a good undertaking, approved by the chief justice, was filed in this court, but this cannot avail. There are three distinct appeals. The undertaking filed in the district court refers to one appeal, and while, under the rule of the *Watkins Case*, this would be sufficient to sustain the appeals from the judgment and the order denying a new trial, yet it is impossible to tell whether the undertaking refers to these appeals or to the appeal from the order overruling and denying the exceptions. And, further, it makes no difference whether one of the orders be appealable or not. The undertaking must contain the appropriate references, and, if one of the orders in any case should be not an appealable order, nevertheless the appropriate reference in the undertaking would save the other appeal or appeals.

The motion must be sustained. The appeals are accordingly dismissed.

Dismissed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

WESTERN PLUMBING COMPANY, APPELLANT, v.
FRIED, RESPONDENT.

(No. 2,125.)

(Submitted June 17, 1905. Decided July 11, 1905.)

Mechanics' Liens—Verification—Invalid Lien—Personal Judgment.

Mechanics' Liens—Verification—Insufficiency.

1. A verification, attached to a mechanic's lien (section 2131, Code of Civil Procedure, as amended by Laws 1901, p. 162), and executed by the president of a corporation in its behalf, stating "that the matters and things therein stated are true, to the best of his knowledge, information and belief," is not an affidavit and therefore insufficient for the purpose intended.

Mechanics' Liens—Invalid Lien—Personal Judgment.

2. A party seeking to foreclose a mechanic's lien may have a personal judgment in the same action against the person liable for the materials furnished and the work and labor done, though he fails to establish his lien.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by the Western Plumbing Company against R. M. Fried. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Mr. L. P. Forestell, for Respondent.

The lien was not properly verified and the court committed no error in excluding it. "An affidavit verifying a mechanic's lien must be sworn to positively." (*Dorman v. Crozier*, 14 Kan. 227; *McElwee v. Sanford*, 53 How. Pr. (N. Y.) 89; *Keogh v. Main*, 50 N. Y. Super. Ct. 183; *Montana L. & M. Co. v. Obelisk Min. Co.*, 15 Mont. 20, 26, 37 Pac. 897; *Globe Iron Roofing etc. Co. v. Thatcher*, 87 Ala. 458, 6 South. 366; *Conklin v. Wood*, 3 E. D. Smith (N. Y.), 662; *Orr & L. Hardware Co. v. Needham Co.*, 169 Ill. 100, 61 Am. St. Rep. 151, 48 N. E. 444; *Long v. Pocahontas Coal Co.*, 117 Ala. 587, 23 South. 526; *Cook v. Rome Brick Co.*, 98 Ala. 409, 12 South. 918.)

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36	66
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As to plaintiff's right to a personal judgment on failure to establish his lien, without amendment of his complaint, see *Castelli v. Trahan*, 78 N. Y. Supp. 950, 77 App. Div. 472; *Gallick v. Englehardt*, 73 N. Y. Supp. 309, 36 Misc. Rep. 269; *Wilson v. Nugent*, 125 Cal. 280, 57 Pac. 1008; *Green v. Sprague*, 120 Ill. 416, 11 N. E. 859; *Hursey v. Hassam*, 45 Miss. 133; *Tian v. Lloyd*, 21 Tex. Civ. App. 433, 52 S. W. 982; *Hildebrandt v. Savage*, 4 Wash. 524, 30 Pac. 643, 32 Pac. 109; *Laycock v. Parker*, 103 Wis. 161, 79 N. W. 327.

Mr. O. M. Hall, for Appellant.

The lien is unquestionably verified by affidavit and technically complies with the terms of section 2131, Code of Civil Procedure. It is the policy of courts generally and it has always been the policy of this court to construe mechanics' liens liberally and with a view to sustaining the lien. (*Black v. Appolonio*, 1 Mont. 342; *Putnam et al. v. Ross et al.*, 46 Mo. 337; *Oster v. Robeneau*, 46 Mo. 595; *Deathrige v. Woods*, 37 Kan. 59; *Schroder v. Muller*, 33 Mo. App. 33. See, also, *Gray v. Voorhis*, 8 Hun (N. Y.), 612; *Chapman v. Brewer*, 43 Neb. 890, 47 Am. St. Rep. 779, 62 N. W. 320; *Laswell v. Church*, 46 Mo. 279; *Finley v. West*, 51 Mo. App. 569; *Kezartee v. Marks et al.*, 15 Or. 529, 16 Pac. 407.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought by the Western Plumbing Company, a corporation, to enforce a mechanic's lien. The allegations of the complaint were denied in the answer, and upon the issues thus framed the cause was tried. Upon the trial plaintiff offered in evidence the lien which was verified as follows: "John Maus, being first duly sworn, on oath says that he is the president of the Western Plumbing Company, a corporation, and as such makes this affidavit; that he has read the foregoing claim of lien, knows the contents thereof, and that the matters and things therein stated are true, to the best of

his knowledge, information, and belief." This was objected to on the ground that the lien, not being verified in the manner required by law, was invalid and of no effect. This objection was sustained, and thereupon counsel for the defendant moved the court to dismiss the plaintiff's action, for the reason that, it being an action to foreclose a lien, and there being no proper lien in the case, no personal judgment could be entered against the defendant. This motion was likewise sustained, the action dismissed, and a judgment of dismissal entered. From this judgment this appeal is prosecuted.

The only errors assigned are, first, the order of the court sustaining the objection to the introduction of the lien, and, second, the order of the court sustaining defendant's motion to dismiss plaintiff's action. Each of these questions has been determined by this court.

1. Section 2131 of the Code of Civil Procedure as amended by an Act of the Seventh Legislative Assembly, approved March 7, 1901 (Session Laws, 1901, p. 162), provides, among other things: "Every person wishing to avail himself of the benefits of this chapter, must file with the county clerk of the county in which the property or premises mentioned in the preceding section is situated, and within ninety days after the material or machinery aforesaid has been furnished, or the work or labor performed, a just and true account of the amount due, after allowing all credits, and containing a correct description of the property to be charged with such lien, verified by affidavit, * * *

In *Benepe-Owenhouse Co. v. Scheidegger*, 32 Mont. 424, 80 Pac. 1024, this court held that a complaint verified in substantially the same manner as this lien is not an affidavit. The reason for the rule announced in that case is equally applicable in this. (Boisot on Mechanics' Liens, sec. 452.)

The statute provides that the lien is made up of, first, the account; second, the description of the property; and, third, the affidavit. The account is required to be a just and true one, showing the amount due the claimant after allowing all

credits, and there must be a correct description of the property to be charged with the lien. This account and description is required to be verified by affidavit, and the affidavit is made an essential part of the lien—as much so as the account or the description of the property. Therefore, if there was no affidavit attached to the account and description, there was in fact no lien, and the court properly excluded the pretended one offered in evidence.

2. May a party seeking to foreclose a mechanic's lien, although he fails to establish his lien, nevertheless have a personal judgment in the same action against the person liable for the materials furnished or work or labor done? This question was answered in the affirmative in *Goodrich Lumber Co. v. Davie et al.*, 13 Mont. 76, 32 Pac. 282, and in *Aldritt v. Pantan et al.*, 17 Mont. 187, 42 Pac. 767, and those decisions are conclusive of the question here. In this respect the court erred, and for this error the judgment is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

GREAT FALLS WATER POWER AND TOWNSITE
COMPANY, RESPONDENT, v. BOSTON AND MON-
TANA CONSOLIDATED COPPER AND SILVER
MINING COMPANY, APPELLANT.

(No. 2,097.)

(Submitted May 3, 1905. Decided July 11, 1905.)

Contracts—Construction—Supply of Water Power.

1. A contract bound plaintiff to deliver to defendant power as follows: "For the first five years, 5,000 horse-powers free of charge; for the second five years, 5,000 horse-powers at the annual rate of \$2.50 per horse-power; and thenceforth 5,000 horse-powers at the

annual rate of \$5.00 per horse-power, or so much thereof as [defendant] shall consume. It is understood that if [defendant] desires further power, and the same is not being used, [plaintiff] will furnish it for the first ten years at the annual rate of \$2.50 per horse-power, and thereafter at the annual rate of \$5.00 per horse-power." *Held*, that the "first ten years" used in the stipulation for extra power ran concurrently with the five-year periods for which the power rate was fixed; and their commencement was not postponed until defendant should commence using extra power, but at the expiration of ten years from the date when power was first furnished under the contract defendant was bound to pay the \$5 rate for all power used by it, whether in excess of five thousand horse-powers or not.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by the Great Falls Water Power and Townsite Company against the Boston and Montana Consolidated Copper and Silver Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Mr. Ransom Cooper, for Appellant.

Mr. I. Parker Veazey, for Respondent.

MR. JUSTICE MILBURN delivered the opinion of the court.

This is an appeal from the judgment entered on the pleadings in favor of the plaintiff. On the 12th day of September, 1889, the plaintiff and defendant entered into a contract, evidenced by a written instrument, the whole of the contract being set forth in the complaint. The pleadings are lengthy, but it will not be necessary to make more than a short statement as to that part of the agreement which is in dispute. The defendant, being desirous of establishing on the Missouri river, near Great Falls, upon lands obtained from the plaintiff, a large establishment for the smelting and treatment of ores, and the plaintiff, being desirous that the smelting company should locate its plant at the place suggested for mutual benefit, agreed, among other things, as set out in section 8 of the contract, as follows:

"The Townsite Company agrees that it will furnish the Smelting Company water sufficient for its wheels to deliver the following amounts of power, said water being judiciously and economically used, and on the following terms: beginning at the time when said Smelting Company shall give notice to the Townsite Company that it is ready to use power and for power as delivered from its wheels, to wit: For the first five (5) years, five thousand (5,000) horse-powers free of charge; for the second five (5) years, five thousand horse-powers at the annual rate of two dollars and fifty cents (\$2.50) per horse-power, and thenceforth five thousand (5,000) horse-powers at the annual rate of five dollars (\$5.00) per horse-power, or so much thereof as the Smelting Company shall consume.

"It is understood that if the Smelting Company desires further power, and the same is not being used, the Townsite Company will furnish it for the first ten (10) years at the annual rate of two dollars and fifty cents (\$2.50) per horse-power, and thereafter at the annual rate of five dollars (\$5.00) per horse-power.

"If the total amount of power developed by the dam as now proposed to be constructed is absorbed by works and industries, then said Townsite Company will increase the height of the dam if practicable and deliver to the Smelting Company such additional amounts of power as it will consume at the annual rate for the first ten (10) years of two dollars and fifty cents (\$2.50) per horse-power and thereafter at the annual rate of five dollars (\$5.00) per horse-power."

The smelting company, on the 21st day of February, 1892, notified the plaintiff that it was ready to use, and had commenced to use, the power spoken of in the contract. On the 1st day of October, 1896, the defendant commenced the use of power in excess of the five thousand horse-power. The defendant contends that from and after February 21, 1902, and until the 1st day of October, 1906, it should pay for all power for which it is required to pay under the terms of said contract at the rate of \$5 per horse-power per annum for the first five thou-

sand horse-power, and only \$2.50 per horse-power per annum for all in excess of the five thousand horse-power, and after the 1st day of October, 1906, at the rate of \$5 for the extra power; whereas the plaintiff contends that the defendant should pay from and after February 21, 1902, for all horse-power for which it is required to pay under the terms of the contract at the rate of \$5 per annum. It was on the 1st of October, 1896, that the defendant commenced to use the power in excess of five thousand horse-power.

The defendant holds that the phrase "for the first ten years," used in that part of the contract quoted herein, relates to a period of time running from the day when the "further" or "additional" power was first furnished; whereas the plaintiff is of the opinion that the phrase "for the first ten years" refers to the two periods of five years each mentioned in the first paragraph of said section 8. The court below took the latter view as to the proper construction of the contract, and entered judgment for the plaintiff. It appears that the defendant, under its understanding as to the agreement with plaintiff, paid at the rate of \$2.50, and not \$5, per horse-power, for the time mentioned, and agreed to pay the difference, provided it was determined by the courts in this suit that it should so pay.

It seems to us that there is no difficulty in understanding this contract. The plaintiff furnished to the defendant, for the purpose of fostering the infant industry, the use of five thousand horse-power for five years from the 21st day of February, 1892, gratis; for the second five years it agreed to furnish the five thousand horse-power at the rate of \$2.50 per horse-power; and thenceforth—that is, after the expiration of the two terms of five years each, to wit, ten years (from February 21, 1892)—the five thousand horse-power at \$5 per horse-power, or so much thereof as the smelting company might need. Thus much it was compelled to furnish, and could not sell to other parties. But it was understood, as stated in the second paragraph, that if the company for the first ten years should need more, and the same were not being used by other parties, then it would

furnish the extra power any time during the said ten years at the rate of \$2.50 per horse-power, and thereafter—that is, after the expiration of the ten years—the said extra amount would be furnished at the rate of \$5 per horse-power. No question is before us as to any amount having been furnished by raising the height of the dam, as spoken of in the third paragraph.

The only power that the company positively agreed to furnish was five thousand horse-power gratis for five years, and at \$2.50 for the next five years, and at \$5 thereafter. If it had any power which it had not sold to other people, it would furnish the same to the company during the first ten years at \$2.50 per horse-power, and thereafter at the rate of \$5 per horse-power. Thus we have stated it twice, and we cannot see any other construction that can possibly be put upon it.

Appellant contends that the smelting company was to have the extra power at the favored rate of \$2.50 for a period of ten years from the date when it should get it after demanding the same; that is, if it should at any time, perhaps twenty-five years after the expiration of the first ten years of the operation of the plant, need and demand any number of horse-power, say one thousand or twenty thousand, it should be at once furnished, and for a period of ten years, at \$2.50 per horse-power. We think the understanding of this court and of the district court is more reasonable. The fostering period was, in our opinion, ten years from February 21, 1892.

We are therefore of the opinion that the court below was right in finding for the plaintiff in its contention and entering judgment accordingly. Judgment affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

Rehearing denied July 29, 1905.

SAYRE, RESPONDENT, v. JOHNSON, APPELLANT.

33	15
41	12

(No. 2,124.)

(Submitted June 15, 1905. Decided July 11, 1905.)

*Water Rights—Measure of Appropriation—Useful and Beneficial Use of Water—Use on Leased School Lands—Briefs—Waiver of Errors.***Appeal—Briefs—Waiver of Errors.**

1. Matters specified as error on appeal, but not discussed in the brief, will be deemed waived.

Water Rights—Measure of Appropriation.

2. The measure of an appropriation of water does not depend upon the *average* amount of the water flowing in the stream, but upon the *greatest* amount, reference being had to the appropriator's needs for the water and his facility for conducting it to the place of intended use.

Water Rights—Appropriation—Useful and Beneficial Purpose.

3. Where a successor in interest of an appropriator of water greatly increased the amount of grass for pasture by irrigation, such use of the water was a useful and beneficial one within the meaning of section 1881 of the Civil Code.

Water Rights—Sale of Part of Water Appropriated—Effect—Appeal.

4. An owner of a water right of three hundred inches disposed of one hundred and sixty inches thereof, but repurchased the same as soon as possible upon discovering his mistake. *Held*, that while such sale was some evidence of the fact that the vendor did not have use for the full three hundred inches, yet, the district court having determined that he had use for the water and that the sale was not evidence of bad faith, the supreme court will not disturb the conclusion reached.

Water Rights—Use by Owner on Leased School Lands.

5. Neither an appropriator of water nor the vendee of such water right need be the owner in fee simple of the land upon which the water is to be used, but may use it upon school land leased from the state.

Appeal from District Court, Meagher County; W. R. C. Stewart, Judge.

ACTION by Ed. Sayre against David Johnson. From a judgment in favor of plaintiff, and from an order denying his motion for a new trial, defendant appeals. Affirmed.

Mr. E. A. Carleton, for Appellant.

The *corpus* of water is not susceptible of ownership in Montana; all that an appropriator or his successor in interest can own, hold or sell is merely a usufructuary interest in the water, i. e., a right to its beneficial use, and no more. There is no proprietorship in the water. (Long on Irrigation, sec. 9. See, also, *Vernon Irr. Co. v. City of Los Angeles*, 106 Cal. 237, 39 Pac. 762; *Hargrave v. Cook*, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390.)

Mr. N. B. Smith and *Messrs. Word & Word*, for Respondent.

The doctrine is established beyond dispute that a water right may be sold and transferred separately from the land for which it was appropriated; that the owner may change the place of diversion, if others are not thereby injured, and that the water may be used for purposes other than those for which it was appropriated. (17 Am. & Eng. Ency. of Law, 517; *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558, 39 Pac. 1054; *Smith v. Denniff*, 24 Mont. 20, 30, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The purpose of this action was to have determined the relative rights of the parties to the use of waters of the East Fork of Mud Creek, in Meagher county. The plaintiff claims a right to the use of three hundred inches of such water, based upon an appropriation for that amount made by Charles M. Holliday on the 15th day of July, 1895, to which right the plaintiff succeeded by purchase from Holliday in 1901. The defendant disputes the validity of plaintiff's claim, and seeks to establish his right to the use of three hundred inches of water in said creek, based upon his appropriation made September 9, 1901. After the issues were made up, the defendant demanded a jury trial, which was denied. The court made findings of fact and conclusions of law, all favorable to the plaintiff, and entered a

decree establishing plaintiff's right to the use of three hundred inches of water appropriated in 1895, and defendant's right to a like amount appropriated in 1901. From this decree and from an order denying his motion for a new trial the defendant appealed.

While defendant specifies as errors relied upon, the order of the court refusing his application for a jury trial, the order of the court in admitting in evidence a certain deed, and the order of the court taxing costs against him, these questions are not discussed in the brief at all, and therefore must be deemed waived. (*Matusevitz v. Hughes*, 26 Mont. 212, 66 Pac. 930, 68 Pac. 467; *Hayes v. Union Mercantile Co. et al.*, 27 Mont. 264, 70 Pac. 975.)

The only question presented by argument is the insufficiency of the evidence to sustain findings of fact numbered 6, 8, 9, and 10, and to justify the conclusion of the court in awarding the plaintiff the prior right to the use of three hundred inches of water.

Finding No. 6 is that the full amount of three hundred inches of water was necessary to irrigate the lands belonging to Holliday, and that Holliday used that amount continuously from the date of his appropriation to the date of his sale to Sayre.

Finding No. 8 is that from the time of his purchase of this water continuously to the commencement of this action the plaintiff, Sayre, had used three hundred inches of water of said creek, except when prevented by the defendant, and except for a period of time from February 4, 1902, to April 20, 1903, during which time one Jesse H. Weston was the owner of one hundred and sixty inches of the water claimed by this plaintiff, by virtue of a purchase from him.

Finding No. 9 is that the full amount of three hundred inches of water is necessary to irrigate the land owned by the plaintiff, Sayre. These three findings of fact and the conclusion that the plaintiff is entitled to the right to use three hundred inches of water of said creek, may be considered together, as they depend upon the same character of evidence.

There is evidence sufficient to show that, during each of the three years immediately prior to the sale of the water right by Holliday to Sayre, Holliday irrigated about one hundred and forty acres of land, and in doing so used all the water in the creek. The evidence is not clear as to just what that amount was, but if it exceeded three hundred inches, the amount appropriated by Holliday, neither Holliday nor his successor in interest, Sayre, profited by it, for neither claimed more than three hundred inches by virtue of that appropriation. If the utmost used was less than three hundred inches, appellant cannot complain, for each used all the water there was. The evidence is likewise sufficient to show that Sayre has use for the full amount of three hundred inches, and has likewise used all the water in the creek when not molested. His claim, however, was properly limited to three hundred inches, the amount of the Holliday appropriation.

It is said, however, that there are not three hundred inches flowing in the creek during irrigating season, and therefore the evidence could not sustain these findings. The evidence does show that in the spring there is flowing in this stream as much as eight hundred or nine hundred inches of water, and that the amount rapidly decreases until there is very little or none at all.

Upon the trial, counsel for defendant (appellant here) showed by his cross-examination of witnesses for both plaintiff and defendant, that the average flow of water in this stream was from one hundred to one hundred and fifty inches during the irrigating season, and from this appellant contends that the utmost which could have been awarded to plaintiff was from one hundred to one hundred and fifty inches. But in this appellant is in error. The measure of an appropriation of water is not made to depend upon the average amount of the water flowing in the stream, but upon the greatest amount; reference being had to the appropriator's needs for the water, and his facility for conducting it to the place of intended use. In other words, if the plaintiff had need for three hundred inches of water, and his ditch would carry that amount, he was entitled to have

his appropriation fixed at that amount. If that amount is ever in the stream during the irrigating season, plaintiff will get it. If it is not, appellant is not injured at all. The evidence shows that respondent has use for all there is in the stream, up to three hundred inches. Furthermore, defendant occupies the inconsistent position of contending that the plaintiff cannot establish a right to three hundred inches of the water, because it is not in the creek, and at the same time asking the court to decree to him an appropriation of three hundred inches out of the same stream.

But appellant contends, first, that respondent's use of the water is not a useful and beneficial one, within the meaning of those terms as employed in section 1881 of the Civil Code, at least in so far as the water is used upon his homestead, which is devoted to grazing purposes. But the evidence does show that by irrigation the amount of grass for pasture is greatly increased. If the respondent should cut the grass for hay, it would hardly be contended that the use of the water was not then beneficial, within the meaning of the statute; and if so, it can hardly be that the question whether the use is a beneficial one can be made to depend upon the particular manner in which respondent feeds the grass procured by the irrigation. While the statute has failed to define the terms "useful" or "beneficial," as used in this connection, we are of the opinion that the use by respondent comes within the meaning of those terms as they are employed.

Second. It is further contended that the sale by Sayre to Weston of the right to use one hundred and sixty inches of the water is evidence that Sayre did not have use for the full three hundred inches; and so it is some evidence of that fact. But Sayre explains that transaction by saying that he discovered his mistake and bought the right back as soon as possible, the year after he sold it. However, all of this evidence was before the trial court upon the question of plaintiff's good faith in that transaction, and the court below having determined from all the evidence upon the subject that Sayre had use for the water,

and that the sale to Weston was not evidence of bad faith, we are not disposed to disturb the conclusion reached.

Finally, it is said that Sayre's use is not within the spirit of the statute, for the reason that some of the land for which this water right was purchased does not belong to Sayre, but is state school land, leased by him from the state. But in this, also, appellant is in error. The law does not require that an appropriator of water must be the owner in fee simple of the land upon which the water is to be used. If it did, the appellant would have no standing in court, for he does not own the land for which he seeks an appropriation of the same water. (*Smith v. Denniff*, 23 Mont. 65, 57 Pac. 557, 50 L. R. A. 737; on rehearing, 24 Mont. 20, 60 Pac. 398, 81 Am. St. Rep. 408, 50 L. R. A. 741; *Toohey v. Campbell et al.*, 24 Mont. 13, 60 Pac. 396; Long on Irrigation, sec. 35, and cases cited.)

So far as finding No. 10, to the effect that defendant interfered with the use of the water by plaintiff, is concerned, the evidence is ample to support it.

While it would have been more nearly accurate for the court below to have found that Holliday's use was of all of the water flowing in the stream, instead of the definite amount as fixed by the court, still, in the end, it amounts to the same thing, for the court properly limited the appropriation to three hundred inches.

No error appearing, the judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLEY and MR. JUSTICE MILBURN concur.

SPELLMAN, RESPONDENT, v. RHODE, APPELLANT.

33	21
138	413

(No. 2,020.)

(Submitted June 16, 1905. Decided July 11, 1905.)

*Forcible Entry—Complaint—Sufficiency—Nature of Action—
Evidence—Variance—Self-serving Declarations—Defenses—
Counterclaim—Appeal—Pleadings—Theory of Case.*

Forcible Entry—Pleadings—Sufficiency—Appeal—Theory of Case.

1. Where the case was tried on the theory that the complaint stated a cause of action for a forcible entry under Code of Civil Procedure, section 2080, without objection by either party, its sufficiency will be determined on this theory on appeal, although it contains some allegations more appropriate to an action in ejectment.

Forcible Entry—Complaint—Sufficiency.

2. A complaint alleging that plaintiff was in possession of certain described lands, engaged in cultivating them as a homestead settlement, and that defendant forcibly and without right entered thereon and by force and arms ejected plaintiff therefrom, states a cause of action for a forcible entry under Code of Civil Procedure, section 2080, subdivision 1.

Forcible Entry—Neither Title nor Right of Possession Issuable.

3. In an action for forcible entry under Code of Civil Procedure, section 2080, neither the title nor the right to the possession of land may be made matters of investigation.

Forcible Entry—Evidence.

4. In an action under Code of Civil Procedure, section 2080, subdivision 1, for a forcible entry, evidence held insufficient to show that the entry was by violence.

Forcible Entry—Pleadings—Proof—Variance.

5. Where, in an action under Code of Civil Procedure, section 2080, subdivision 1, for a forcible entry, the evidence showed a peaceable entry, and a subsequent forcible turning out of plaintiff, which conduct is made a forcible entry by subdivision 2 of said section, the variance was such as to constitute a failure of proof, within section 772 of the same code, providing that when the allegation of the claim to which the proof is directed, is unproved in its general scope and meaning, it shall be regarded as a failure of proof.

Forcible Entry—Evidence of Title—Materiality.

6. In an action for forcible entry, evidence that before the entry plaintiff pointed out to witness the land in dispute, as part of a tract he intended to take as a homestead, tending to show a claim of homestead right merely, that is, inchoate title to the land in question, was immaterial, since the question of title could not become a material issue.

Forcible Entry—Evidence—Self-serving Declarations.

7. In an action for forcible entry, evidence in behalf of plaintiff, that before the act complained of, plaintiff stated that he claimed

one hundred and sixty acres, pointed out to witness the land he desired to take, and that the land pointed out was that in dispute, was incompetent, the statements so made to witness having been self-serving declarations.

Forcible Entry—Abandonment.

8. In an action for forcible entry, abandonment of the land by plaintiff subsequent to the wrong, furnishes no justification of the act complained of; neither is abandonment a pertinent inquiry in such an action.

Forcible Entry—Findings—Verdict.

9. Where, in an action for a forcible entry on certain land, the evidence showed that only part of the land was in dispute, a verdict to the effect that the jury found for plaintiff, and that he was entitled to possession of the land shown by the evidence to be in dispute, would, if the irrelevant finding as to right of possession were stricken out, allow a judgment for restitution of land not in controversy, and was erroneous.

Forcible Entry—Defense—Acts of Plaintiff After Entry.

10. In an action for forcible entry, acts of plaintiff subsequent to the entry are no defense.

Forcible Entry—Counterclaims.

11. Under Code of Civil Procedure, sections 690-692, providing for counterclaims, a counterclaim for money in an action for a forcible entry cannot be availed of.

Appeal from District Court, Dawson County; C. H. Loud, Judge.

ACTION by Thomas Spellman against George L. Rhode. From a judgment for plaintiff and an order denying defendant a new trial, he appeals. Reversed.

Mr. Henri J. Haskell, and Mr. George W. Farr, for Respondent.

Mr. Sydney Sanner, for Appellant.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action to obtain a judgment for the restitution of the possession of the south half of the southwest quarter and the northeast quarter of the southwest quarter of section 30, township 24 north, of range 60 east, situate in Dawson county, and for damages for a forcible entry thereon by the defendant. The plaintiff had verdict and judgment. The defendant has appealed from the judgment and an order denying a new trial.

Contention is made that the complaint does not state a cause of action. It certainly is not a model, for it contains many allegations which are inconsistent with the purpose sought. Some of them seem to have been inserted by the pleader on the theory that the action is one in ejectment, in that they tend to show inchoate title and right of possession under the homestead laws of the United States. The trial court adopted the theory, however, that it is a summary action for a forcible entry under the statute. (Code of Civil Proc., sec. 2080.) Since this was done without objection by the parties, and the cause was heard and proceeded to judgment on this theory, the appellant has no ground to complain that the course adopted by the court was not correct, provided the pleading is sufficient from the point of view adopted. Indeed, appellant does not complain that the district court adopted a wrong theory of the case, but insists that even upon its own theory the averments are not sufficient. This contention, we think, is without merit.

Rejecting as surplusage the averments referred to as inconsistent, the pleading alleges, in substance, that the plaintiff was in the spring of 1901 in actual possession of certain described lands, engaged in cultivating them as a homestead settlement, and that at that time the defendant forcibly and without right entered thereon, and by force and arms ejected plaintiff therefrom. Section 2080, *supra*, declares: "Every person is guilty of a forcible entry who either: (1) By breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror enters upon or into any real property or mining claim; or (2) who, after entering peaceably upon real property or mining claim, turns out by force, threats or menacing conduct, the party in possession." The allegations of the complaint sufficiently set forth the elements of the cause of action provided for in the first subdivision of the section. The purpose of the provisions of the Code contained in the chapter in which this section is found (Chapter IV, Part III, Title III, Code of Civil Procedure) is to furnish a summary remedy to obtain possession of real property, and to pre-

vent even rightful owners from taking the law into their own hands and proceeding to recover possession by violence. (*Sheehy v. Flaherty*, 8 Mont. 365, 20 Pac. 687.) Section 2080 provides this summary remedy for the forcible entries therein defined, while section 2081 does the like for unlawful detainers, where (1) one person by force, menaces, or threats of violence keeps possession, however it may have been obtained; or (2) where one, in the night or during the absence of the occupant, unlawfully enters and for five days after demand refuses to surrender possession to the former occupant.

From even a casual examination of these sections it is apparent that section 2080 does not contemplate an investigation of the title or right of possession. (*Sheehy v. Flaherty*, *supra*, and cases cited.) Indeed, the issue of title or right of possession may not be made in an action under either section 2080 or 2081, unless it be that section 2092 of the Code of Civil Procedure, which declares what the parties may show, permits the issue of right of possession under some circumstances in actions under section 2081. Section 2092 was amended, when brought forward into the Code from the Compiled Statutes of 1887 (Compiled Statutes 1887, Division 1, sec. 723), by the substitution of the words "forcible detainer" for the words "unlawful holding over"; but how far, if at all, the general rule stated in *Sheehy v. Flaherty*, *supra*, was changed by the amendment, need not be discussed, as the question does not arise in this case. It is sufficient to say that such an issue cannot arise or be tried in the case at bar under the theory adopted by the court.

But while the pleading is sufficient, in our opinion the evidence does not support the verdict. The cause of action alleged is one arising under subdivision 1 of section 2080, while the evidence tends to show, if it supports any cause of action at all, one arising under the second subdivision. The lands in controversy were, at the time the alleged forcible entry was committed, unsurveyed public lands. They were inclosed by the plaintiff, with several hundred acres of other public land, by a common fence. The dwelling and outhouses of the plaintiff

are on the southeast quarter of the southeast quarter of section 25, township 24 north, of range 59 east. He claimed as his homestead this land, together with the east half of the southwest quarter, and the southwest quarter of the southwest quarter of section 30, township 24 north, of range 60 east. During the plaintiffs' absence from home, on May 22, 1901, the defendant entered the main inclosure, and, while intending to fence and occupy the east half of the southwest quarter of section 30 with other lands to the east, but not knowing where the lines were, fenced about one-half of this portion of the section by a line of fence running north and south, and joining the fence upon other lands to the east. He claimed it as a part of his homestead. Theretofore and since 1899 the plaintiff had been cutting hay from this land, and stacking and feeding it to his cattle. He had improved it somewhat by leveling the surface and sowing grass seed. He protected the hay by wire fences around the stacks. Defendant's fences included these inclosures and what hay was there at the time he entered. During that season the plaintiff cut hay as before outside of defendant's fence, while defendant cut what grew within his inclosure, and used the land for pasturage. It does not appear distinctly whether the entry was made by the defendant by breaking down the fence of plaintiff, or whether it was through a gate. No force or violence was used by defendant until some months after the entry. On two occasions the plaintiff undertook to fence the land in dispute. On both occasions the defendant put him and his hired men off the land by force and threats. Subsequently, when the lines had been fixed by survey, the defendant moved his fence to the west so as to exclude the plaintiff entirely from all portions of the disputed ground, and up to the time the action was brought, maintained exclusive possession.

Now, assuming that the various acts of plaintiff in seeding the ground and cutting and stacking the hay and inclosing it in corrals, and thereafter feeding it to his cattle at the corrals, were sufficient to show actual possession, the facts detailed do not tend to support the allegations of the complaint, but rather

present a case falling under the second subdivision of section 2080, and there is such a variance between the allegations and the proof as that it must be said that there is a total failure of proof. (Code of Civil Proc., sec. 772.) The defendant is entitled to know with reasonable certainty what defense he is required to make. It seems manifest that, when charged with a forcible entry by means of violence and circumstances of terror, he cannot be convicted upon evidence which tends only to show that he entered peaceably, and thereafter, by force, threats or menacing conduct, turned the plaintiff out. The contention that the evidence is insufficient to sustain the verdict must therefore be sustained.

Complaint is made that the court erred in permitting the witness Meadors to testify over defendant's objections as to declarations made by the plaintiff in 1901 as to what lands he claimed or intended to claim as his homestead. The witness was permitted to state that at that time, being engaged in trying to fix the lines prior to the official survey, the plaintiff stated that he claimed one hundred and sixty acres, and pointed out to him where he desired to take it. The witness further stated, over objection, that the lands pointed out were those in dispute. If this evidence tended to establish any fact at all, it tended to show a claim of homestead right (that is, inchoate title to the disputed land), and not actual possession—a fact wholly immaterial, for title could not become a material issue. Besides, they were self-serving declarations of intention, which would not have been competent even upon the issue of title. The admission of this evidence was error.

Complaint is also made that the court erred in certain instructions submitted to the jury, and in refusing to submit certain others requested by the defendant. What has already been said as to the nature of the action and the issues properly involved renders it unnecessary to discuss the instructions. On another trial the court will doubtless find no difficulty in stating the law applicable to the case. Most of the criticisms made of the instructions submitted are verbal and without merit.

Some evidence was introduced by the defendant from which it was sought to have the jury draw the inference that the plaintiff had abandoned his claim to the land since the controversy arose. The court submitted certain instructions in this connection. Abandonment of the homestead claim could be a pertinent inquiry upon an issue of title only. As this was not an issue in the case, it was not a matter upon which the jury required instruction. Abandonment subsequent to the wrong could not be justification of it.

It is said that the verdict is not responsive to the issues. It is as follows: "We, the jury, find for the plaintiff, and that he is entitled to the possession of the east one-half of the southwest $\frac{1}{4}$ of Sec. 30, Tp. 24 N., R. 60, and that he recover damages against the defendant in the sum of \$285." Rejecting as surplusage the clause, "and that he is entitled to the possession," etc., it would be entirely responsive to the issues presented by the pleadings. The difficulty with it, however, is that the evidence shows that the only dispute is as to the land it describes, while, as a matter of fact, the complaint charges a forcible entry also upon the southwest quarter of the southwest quarter of section 30. As it stands, it embodies a finding upon an issue that was not in the case, and, if this be omitted, it would authorize a judgment for restitution of land not in dispute. It should, in form and substance, have found that the defendant was guilty of a forcible entry upon the portion of the land described, and fixed the amount of damages. On another trial this error may be avoided by submitting a proper form, enabling the jury to respond in their finding to the issue actually tried.

Prior to the trial the court, on motion of plaintiff, struck out a portion of defendant's answer in which he alleged certain acts of plaintiff occurring subsequent to the alleged forcible entry as an estoppel. At the same time the court also struck out of the answer, on motion, most of a number of items set up in a separate count as a counterclaim for damages. This action of the court is assigned as error. We think the court was correct in both instances. The defendant could not be

heard to say that any act of the plaintiff subsequent to the forcible entry induced him to make forcible entry. Nor could he set up claims for damages due him, in order to defeat plaintiff. The nature of the action is such that a counterclaim for money cannot be availed of to defeat it. The remarks made by this court in the case of *Ayotte v. Nadeau*, recently decided, 32 Mont. 498, 81 Pac. 145, are pertinent here. If the plaintiff should succeed in this action, and recover a judgment authorizing a restitution to him of the property, and the defendant should succeed upon his counterclaim, there would be two independent judgments, neither of which could in any way interfere with or affect the execution of the other. Such a condition is not contemplated by the sections of the Code of Civil Procedure (sections 690, 691, 692) providing for counterclaims.

For the reasons stated, the judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

MARSHALL, RESPONDENT, v. TRERISE ET AL., DEFENDANTS;
TRERISE, APPELLANT.

(No. 2,127.)

(Submitted June 19, 1905. Decided July 14, 1905.)

*Real Estate—Agents—Sale—Contracts—Statute of Frauds—
—Instructions—Evidence.*

Real Estate—Brokers—Contracts—Statute of Frauds.

1. Where it did not appear that a broker's contract of employment to sell real estate was in writing, or that any note or memorandum thereof, signed by the party to be charged, had been executed as required by Civil Code, section 2185, subdivision 6, no recovery could be had for services rendered thereon.

Real Estate—Sale—Agents—Counterclaims—Conflicting Instructions.

2. In an action on a promissory note for \$700, where a counterclaim was interposed setting up that plaintiff was indebted to defendants in the sum of \$1,000 for services performed by one of them as real estate agent, instructions examined and held not to be conflicting.

Evidence—Contracts—Counterclaims.

3. Evidence introduced by defendant to prove a counterclaim for services as a real estate agent, no testimony having been offered by plaintiff in opposition thereto, *held* to be insufficient to prove a contract upon which the counterclaim—even upon an erroneous theory of the court as to the law applicable—could be supported.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by J. W. Marshall against J. H. Trerise and another. From a judgment in favor of plaintiff and from an order denying his motion for a new trial, defendant Trerise appeals. Affirmed.

Mr. B. S. Thresher, and Mr. O. J. Saville, for Appellant.

Where the instructions on a material point are conflicting and contradictory it is impossible for the jury to decide which should prevail, and it is equally impossible after the verdict to know that the jury was not influenced by that instruction which was erroneous, as the one or the other must necessarily be where the two are repugnant. (*State v. Sloan*, 22 Mont. 293, 56 Pac. 364; *Heilbronner v. Lloyd*, 17 Mont. 307, 42 Pac. 853; *Kelly v. Cable Co.*, 7 Mont. 77, 14 Pac. 633; *Flick v. Gold Hill Min. Co.*, 8 Mont. 298, 20 Pac. 807; *Brown v. McAllister*, 39 Cal. 573; *Aguirre v. Alexander*, 58 Cal. 27; *State v. Shadwell*, 22 Mont. 575, 57 Pac. 281.)

Mr. C. M. Parr, for Respondent.

"An erroneous instruction which produces no injury will not be ground for reversal." (Hayne on New Trial and Appeal, secs. 132, 286; *Hisler v. Carr*, 34 Cal. 645; *Bradley v. Lee*, 38 Cal. 362; *Satterlee v. Bliss*, 36 Cal. 519.) If the defendant be not entitled to recover upon the whole case, errors in instructions as to the defense will not be regarded. (*Enright v. San Francisco etc. R. R. Co.*, 33 Cal. 283; *Barth v. Clise*, 12 Wall. 401, 20 L. Ed. 393; Hayne on New Trial and Appeal, sec. 132.)

Error which does not affect the substantial rights of the losing party in the court below cannot be complained of by him, and

furnishes no ground for reversing the judgment. (*Dikeman v. Parrish*, 6 Pa. St. 210, 47 Am. Dec. 465; *Frankfort Bridge Co. v. Williams*, 9 Dana (Ky.), 403, 35 Am. Dec. 155; *Lee v. Ashbrook*, 14 Mo. 378, 55 Am. Dec. 110; *Kilburn v. Ritchie*, 2 Cal. 145, 56 Am. Dec. 326; *Johnson's Ex. v. Jennings' Admr.*, 10 Gratt. 1, 60 Am. Dec. 323.)

MR. JUSTICE MILBURN delivered the opinion of the court.

Plaintiff sued the defendants upon their promissory note for \$700 and for attorneys' fees, and recovered judgment as prayed. The defendant Trerise appeals from the judgment and from an order denying his motion for a new trial.

The defendants admitted the making of the note, but denied that there was anything due from them to the plaintiff, in that the plaintiff was indebted to Trerise in the sum of \$1,000 for services performed by defendant Orr as a real estate agent, his claim having been assigned to defendant Trerise before the commencement of the action.

Two errors are assigned: First, that the instructions are conflicting; and, second, that the verdict and the judgment are contrary to the evidence—the defendant's position as to the latter assignment being that the evidence in support of his claim was sufficient, and that there had not been introduced any testimony whatever by the plaintiff in opposition thereto, and that therefore the jury should have found for him on the counterclaim.

The instructions, as they appear in the record, are not arranged in proper order. They are few, being only four, the one numbered "2" being first given. It is in regard to the counterclaim, and telling the jury that if it should find from the evidence that plaintiff engaged Orr as alleged, and agreed to pay him \$1,000 for his services, and that Orr carried out his contract, and that the claim had been assigned to Trerise and had not been paid, then Trerise was entitled to recover in the action.

Instruction No. 1, next given, tells the jury that if it should find for Trerise in excess of the amount due on the note there

should be deducted the amount due upon the note from the amount due upon the counterclaim, and a verdict should be rendered for Trerise for the difference.

The third instruction tells the jury about the attorney's fee, and says that, "If you find for the plaintiff, you shall also find a reasonable attorney's fee." The last instruction informs the jury that the defendants admitted the making and delivery of the note, and if the jury believed from the evidence that the defendants had not paid the same except some interest, then the verdict should be for the plaintiff for the principal sum sued for, with interest.

The effect of these instructions is that the jury should adjust the differences between the two parties, and that if it should find for the defendant Trerise in a sum in excess of what might be owing on the note with attorney's fee, then the defendant should have a verdict, otherwise not; and that in any event it should find for the plaintiff for the note, if it had not been paid; and if the counterclaim had not been proven to their satisfaction, then he should have a verdict accordingly for the amount owing upon the note, with attorney's fee.

The theory of the case as submitted by the court to the jury as to the counterclaim was wrong, inasmuch as it does not appear that the contract between the broker and the vendor was in writing, as it should have been under subsection 6 of section 2185 of the Civil Code, to wit: "An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission" is invalid unless the same or some note or memorandum thereof be in writing, and subscribed by the party to be charged or his agent. (*King v. Benson*, 22 Mont. 256, 56 Pac. 280.)

The court submitted the matter of the counterclaim to the jury upon the evidence introduced by defendant, and, as we have seen, gave instructions upon the same as though the aforementioned section of the statute of frauds did not exist. But the question before us is whether or not the evidence thus erroneously submitted to the jury supports the verdict. We have

examined it carefully, and are of the opinion that no contract was proven by the defendant upon which the counterclaim—even upon the erroneous theory of the court as to the law—could be supported.

The instructions are not conflicting, and the evidence is not sufficient to support the counterclaim, and these being the only errors assigned, the judgment and order must be affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied October 10, 1905.

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FLOWERREE CATTLE COMPANY, RESPONDENT, v. LEWIS
AND CLARK COUNTY ET AL., APPELLANTS.

(No. 2,126.)

(Submitted June 17, 1905. Decided July 14, 1905.)

Taxation — Livestock — Situs—Statutes—Amendment—Repeal.

Corporations—Livestock—Where Assessable.

1. *Held*, that where a corporation, engaged in the livestock business, grazed its cattle in T. county in which county the corporate headquarters were maintained, where its real estate was situate, and where its business manager and foreman resided, caused a large number of its livestock to be driven into L. & C. county to be winter-fed, with the intention of having it returned to the former county in the following spring, the *situs* of such livestock for the purposes of taxation—its home—was in the former county, and not in the latter—its temporary abode.

Livestock—Assessment—Statutes—Amendment—Repeal.

2. Under the provisions of section 5163, Political Code, section 3720 of the same Code, relating to the assessment of livestock, was not repealed by section 3943 as amended (Laws 1903, p. 225), the former section being part of Chapter III, Title X, treating of assessment of property generally, and the latter, part of Chapter IX, of the same Title, having to do with the collection of taxes on certain personal property.

Appeal from District Court, Lewis and Clark County; Henry C. Smith, Judge.

ACTION by the Flowerree Cattle Company, a corporation, against the county of Lewis and Clark and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Mr. Albert J. Galen, Attorney-General, and Mr. F. W. Mettler, for Appellants.

Under a statute of Colorado, very similar to ours, the supreme court of Colorado held that stock ranging in a county on the 1st of May is legally assessable in that county, and the fact that the owner sees fit to make return of such stock to the assessor of the county in which he lives and to which the stock is each year driven back to the "home ranch," affords him no ground for relief from the taxation in the first-mentioned county. (*Metcalf v. Fisher*, 2 Colo. App. 375, 31 Pac. 175; *Price v. Kramer*, 4 Colo. 547; *County Com. v. Wilson*, 15 Colo. 90, 24 Pac. 563.)

Section 3943 as amended certainly authorizes the assessment of the property in question in Lewis and Clark county. If section 3720 is in conflict with the Act of 1903, to that extent it is repealed by the repealing clause of said Act. That the legislature had the right to make such a law seems beyond question, for it is elementary that the state may, at its option, impose taxes on tangible personal property within its limits irrespective of the residence or allegiance of the owner. (1 Cooley on Taxation, 3d ed., p. 87.)

"For the purpose of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner, and he may be taxed on its account, at the place where it is, although not the place of his domicile, and even if he is not a citizen or a resident of the state which imposes the tax." (*Pullman Pal. Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613.)

Mr. Wm. Wallace, Jr., and Mr. Charles Donnelly, for Respondent.

The following cases sustain respondent's contention that the livestock was properly assessable in Teton county: *Smith v. Mason*, 48 Kan. 586, 30 Pac. 170; *Ford v. McGregor*, 20 Nev. 446, 23 Pac. 563; *Barnes v. Woodbury*, 17 Nev. 383, 30 Pac. 1068; *State v. Falconberg*, 15 N. J. L. 323; *State v. Haight*, 30 N. J. L. 429; *People v. Caldwell*, 42 Ill. 434, 32 N. E. 691; *New Limerick* Mont., Vol. 33—3

v. *Watson*, 98 Me. 379, 57 Atl. 79; *Standard Cattle Co. v. Baird*, 8 Wyo. 144, 56 Pac. 598, 599; *Mitchell v. Lake Twp.*, 126 Mich. 367, 85 N. W. 865-868.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The Flowerree Cattle Company is a domestic corporation engaged in the livestock business in Teton county, where it maintains its headquarters, where its real estate is situate, and where its business manager and foreman reside. It keeps large numbers of range cattle, which graze in Teton county and also in Choteau county. In the fall of 1903 this company brought into Lewis and Clark county, as was its custom, about two thousand seven hundred head of weak stock, consisting of cows, calves, and bulls, and seventy-seven head of saddle horses, to be winter-fed upon a ranch under contract with the ranch owner, but with the intention on the part of the corporation of returning such stock to its proper range in Teton county as soon as the following spring opened, and the necessity for feeding no longer existed. Approximately two hundred and fifty head of cattle died prior to March 1, 1904. On that date the assessor of Lewis and Clark county assessed the company two thousand six hundred and ninety head of cattle and seventy-seven head of horses for the lump sum of \$38,770. The assessor, in making his assessment, did not place separate valuations on the different kinds of property. None of the stock was running at large in Lewis and Clark county. The assessment was made against the will of the company, which contended that it did not have any property subject to taxation in Lewis and Clark county. All of this property was subsequently returned to and listed for assessment and assessed in Teton county for the year 1904. However, upon the demand of the treasurer of Lewis and Clark county, and to prevent seizure and sale of its property, the company paid the taxes upon the property upon the assessment made by the assessor of Lewis and Clark county, under protest, however, and brought this action to recover back the amount so paid, with interest. The complaint sets forth these

facts much more in detail, and further alleges that the company appeared before the board of equalization and sought relief, which was denied. To this complaint the defendants interposed a general demurrer, which was overruled; and, upon their refusing to plead further, judgment was entered in favor of the plaintiff, according to the prayer of its complaint, and from this judgment these defendants appealed.

The only question presented for consideration is: Was the property in question subject to taxation in Lewis and Clark county for the year 1904, under the facts as disclosed by this complaint?

Sections 3697 and 3700, Political Code, provide generally for the assessment of property. Section 3711 provides for the assessment of the property of a corporation, and provides that it shall be assessed in the county where such property is situate. These provisions are general in their character, and apply equally to all kinds of property. The legislature then made specific provisions for the assessment of particular property under certain conditions. For instance, section 3714 provides that the personal property belonging to the business of a merchant or manufacturer must be listed in the county, town or district where the business is carried on. Section 3715 provides that the personal property of an express, transportation, or stage company, steamboats, vessels, or other water craft, must be listed and assessed in the county, town, or district where such property is usually kept. Section 3716 provides that the personal property and franchises of gas and water companies must be assessed in the county where the principal works are located. And finally section 3720 provides that livestock belonging to a permanent resident of this state must not be listed or assessed while such stock is in transit, nor until it arrives in the county where the person owning the same resides, and must be listed and assessed in such county. If the stock runs at large in another county than the one in which the owner resides, it must be assessed in such other county.

While in some instances the meaning of the lawmakers may be somewhat obscure, we are of the opinion that what was intended was this: That all property shall be assessed in the county which is its home. If the property be real estate, its actual *situs* determines the question of its home. If personal property belonging to a merchant, the county where the merchant's business is conducted determines the home of such property; and likewise, if the property be range stock, its home is its accustomed range—in this case, Teton county. Any other construction would lead to the greatest possible confusion and open the door to tax dodging; for it was never intended that the county within which the particular personal property may chance to be casually or in a transitory sense on the first Monday of March shall be the county entitled to assess and collect the taxes upon it. If so, a resident of Jefferson county who happened to drive into Helena on the first Monday of March would be subject to have his team assessed in Lewis and Clark county, even though he returned to his home the same day, and was not within Lewis and Clark county again during the entire year. Likewise, if that theory should be adopted, unscrupulous taxpayers of a county heavily in debt and having a high tax levy might simply transfer their movable property across the county line into a county having a lower levy, and have it assessed there, effecting a saving for themselves, but at the same time depriving their home county of needed revenue; and it is no stretch of imagination to see that the county having the lowest levy would possibly soon become the county having the largest assessment, while other localities, because of large debts and necessarily large levies, would soon become bankrupt.

An imaginary case was presented upon oral argument of what would amount to an escape from taxation, if, for instance, the property involved in this case should in fact not have been returned to its home in Teton county. But there is no possibility of this, if the several county assessors perform their duties, as doubtless they do; for under section 3701 it was the duty of the assessor of Lewis and Clark county to require from the agent

of this company a verified list of the company's property in Lewis and Clark county on the first Monday of March, 1904, which list, among other things, must have shown the particular property belonging to the company, and the county in which it was situated or in which it was liable to taxation; and upon receipt of such statement showing that this particular property was to be returned to and was taxable in Teton county, it would then have become the duty of the assessor of Lewis and Clark county, under the provisions of section 3708, to have reported such fact to the assessor of Teton county.

We are firmly of the opinion that the idea running through our assessment laws is that property shall be assessed in its home county, for to that county it owes the duty of helping to bear the burden of county government. And this was evidently contemplated by the legislature, for it made provision in the sections above referred to, as in others, for determining the actual home of the particular species of property.

We are further re-enforced in our views by the decisions of other courts. In *Pierce v. Eddy*, 152 Mass. 594, 26 N. E. 99, in reaching this same result, the supreme court of Massachusetts said: "A horse is kept where he is habitually housed, fed and watered; where he lives and has his home, provided there is any such place. The fact of using him more or less across the boundary line of the town does not alter the fact that the place where he is kept is the barn where he lives."

In *People v. Niles*, 35 Cal. 282, it is said: "By thus assigning to personal property a *situs* for the purposes of taxation, we do not consider, however, that it was intended to authorize the listing or taxing out of the owner's county of such personal property as might casually, in the usual and ordinary course of the owner's business, be found in such county on the first Monday in March, or be subsequently in like manner brought into it between that day and the first Monday in August. If A. resides at Placerville, in El Dorado county, and is engaged in teaming between that place and Folsom, in the county of Sacramento, and in the course of his business chances to be with his

team at Folsom, discharging or taking freight, on the first Monday in March, or any subsequent day between that day and the first Monday in August, the *situs* of his team is not, in the sense of the statute, in Sacramento county, but in El Dorado county. If A., residing in Yolo county, drives his carriage into Sacramento county, or has it driven there by his coachman, on the first Monday in March, or any subsequent day between that day and the first Monday in August, it does not thereby become the duty of the assessor of Sacramento county to list and assess it as personal property 'in his county.' It is in his county, it is true, but it is not so in the sense of the statute. Its *situs*, for the purposes of taxation, is in Yolo county."

In *State v. Haight*, 30 N. J. L. 428, the court had under consideration a case in which a New Jersey assessor sought to assess boats engaged in ferrying between the New Jersey and New York coasts. The boats belonged to a New York corporation, and after a review of the revenue laws of New Jersey, and a consideration of the subject at some length, the court said: "The establishment of the principle contended for by the assessor in this case would seem to authorize him in assessing everything that he can find within his official limits at any time while making his assessments, which would render it unsafe for a stranger to our soil to visit it with his property during that time. The law does not contemplate any such thing. It is only intended to tax such personal property of foreigners as is actually located or used within the state with something like permanency, and not having its actual location or home somewhere else. These boats have no actual location or place of residence, so to speak, in this state; but they have a location and home in the state of New York, and cannot, I think, in any sense be considered as belonging here, as the objects of taxation by us." (See, also, *Barnes v. Woodbury*, 17 Nev. 383, 30 Pac. 1068; *State v. Falkinburge*, 15 N. J. L. 320; *Hays v. Pacific Mail Steamship Co.*, 17 How. (U. S.) 597, 15 L. Ed. 254; *St. Louis v. The Ferry Co.*, 11 Wall. 423, 20 L. Ed. 192.)

While these cases are not directly in point with respect to the

question here to be decided, they do illustrate our views, and tend to fortify us in our position that the dominant idea in our assessment laws is that property shall be assessed in the county which is its home.

Some contention is made that by an amendment made by the Eighth Legislative Assembly to section 3943 of the Political Code (Session Laws, 1903, p. 225), section 3720 is repealed. But section 3720 is a part of Chapter III, Title X, Political Code, while section 3943, as amended, is a part of Chapter IX of the same Title and Code; and assuming, but not deciding or expressing any opinion or suggesting any doubt, that section 3943 as amended is constitutional, still, under the rule of construction provided by the Code itself, the amendment to section 3943 did not have any effect upon the provisions of section 3720. Chapter III above has to do with the assessment of property generally, while Chapter IX has to do with the collection of taxes on *certain personal property*. Section 5163 of the Political Code provides as follows: "If the provisions of any chapter conflict with or contravene the provisions of another chapter of the same title, the provisions of each chapter must prevail as to all matters and questions arising out of the subject matter of such chapter." Applying this rule to the sections under consideration, and section 3720 remains in full force and effect, notwithstanding the amendment to section 3943 above.

We are satisfied that the record sufficiently shows that the home of the property in controversy at the time of its assessment in Lewis and Clark county was not in that county, but in Teton county, and that it was properly assessed and the taxes paid in that county. No error appearing, the judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
CONCUR.

**MCKNIGHT, RESPONDENT, v, OREGON SHORT LINE
RAILROAD COMPANY, APPELLANT.**

(No. 2,142.)

(Submitted June 21, 1905. Decided July 17, 1905.)

***Railroads—Killing Livestock—Pleadings—Statutes of Other
States—Judicial Notice.***

Pleading—Statutes of Other States—Judicial Notice.

1. The courts of this state will take judicial notice of such matters only as are enumerated in section 3150 of the Code of Civil Procedure, and the statutes of sister states not being included, a complaint, brought under a statute of Idaho for the killing of cattle by a railroad company, which fails to plead such statute, is therefore fatally defective.

Railroads—Killing of Livestock—Pleadings—Complaint.

2. A complaint in an action for the killing of livestock by a railroad company, brought under section 2680, Revised Statutes of Idaho, which failed to allege that at the time of the killing the defendant company was operating a line of railroad within that state, but stated that the defendant "is a corporation" and "is the owner, controller and operator" of a railroad—which allegations are referable to the time the complaint was verified and filed, and not to the date on which the stock was killed—failed to state a cause of action.

Railroads—Killing of Livestock—Pleadings—Complaint.

3. A complaint, in an action for the killing of livestock by a railroad company, brought under a statute of Idaho (Rev. Stats., sec. 2680), which did not allege that a claim in writing, for the damages suffered by the owner, had been made upon the defendant company, was fatally defective.

Appeal from District Court, Beaverhead County; M. H. Parker, Judge.

ACTION by S. M. McKnight against the Oregon Short Line Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Mr. Robert B. Smith, for Respondent.

Mr. John G. Willis, for Appellant.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action brought by the plaintiff McKnight to recover from the Oregon Short Line Railroad Company \$115 damages for livestock killed in the state of Idaho.

The complaint attempts to state two causes of action. The first is for the recovery of \$75. It is alleged that the defendant is a Utah corporation; that it is the owner, controller and operator of a certain railroad running from Salt Lake, Utah, to Butte City, Montana; that on June 21, 1902, near Monida, in the state of Idaho, the defendant ran one of its trains over and upon, and killed, a certain bull belonging to the plaintiff, of the value of \$75; that within ninety days after the killing of such animal the plaintiff presented to the defendant a demand for the value of the animal killed, but this demand was refused. The second cause of action is for the recovery of \$40, the value of a certain heifer, killed by defendant company on July 12, 1902, at the same place as the other animal. The allegations of this cause of action are similar to those of the first.

The defendant interposed a general demurrer, which was overruled, and then filed an answer denying generally all the allegations in the complaint, except the allegations respecting the corporate existence of the defendant, and that it owns, operates, and controls the line of railroad mentioned in the complaint.

Upon the trial the court permitted the plaintiff to introduce in evidence the statute of Idaho, under which the action was brought. The jury returned a verdict in favor of plaintiff for \$115, and from the judgment entered thereon the defendant company appealed.

The only question presented for our consideration is: Does the complaint state a cause of action? In our opinion the complaint is fatally defective in any of three particulars: 1. The action is brought under the statute of Idaho, and the statute is not pleaded; 2. The complaint does not show that the defendant was operating a line of railroad within the state of Idaho at the time the animals were, or either of them was, killed; and 3. The complaint does not allege that a claim in writing for the

damages suffered, signed by the owner of the animals or his agent, was made upon the defendant company.

1. The complaint shows upon its face that each of the causes of action is predicated upon the laws of Idaho, within which state the animals were killed. Our courts do not take judicial notice of the statute of a sister state. The matters of which they do take judicial notice are enumerated in section 3150 of the Code of Civil Procedure, and the statutes of a sister state are not included; and as that section establishes the law of this state respecting that particular subject, all matters not therein enumerated are excluded. (Code of Civil Proc., secs. 3452, 3453.)

If, then, the court did not take judicial notice of the laws of Idaho, and the same were not set forth in the complaint in order to advise the court, it is difficult to see how the court could determine that the complaint in fact states a cause or causes of action under the laws of that state. It is an elementary rule that where one relies upon a statute of a sister state, such statute must be pleaded and proved as a fact. (20 Ency. of Pl. & Pr., 598; *Bank of Commerce v. Fuqua et al.*, 11 Mont. 285, 28 Am. St. Rep. 461, 28 Pac. 291, 14 L. R. A. 588; *O'Reilly v. New York & New England R. R. Co.*, 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244, 5 L. R. A. 364; *Balfour et al. v. Davis et al.*, 14 Or. 47, 12 Pac. 89; *Lowry v. Moore*, 16 Wash. 476, 58 Am. St. Rep. 49, 48 Pac. 238; *Swank v. Hufnagle*, 111 Ind. 453, 12 N. E. 303.)

2. In order to bring this case within the provisions of the Idaho statute, it was necessary for the complaint to show that at the time the animals were killed the defendant was operating a line of railroad in the state of Idaho. The allegations of the complaint in this regard are: "That the defendant is a corporation," etc.; "that the defendant is the owner, controller and operator of a certain railroad running," etc. These allegations are all in the present tense and referable to the time the complaint was verified and filed, which was December 10, 1902. One animal was killed June 21, and the other July 12, 1902,

and by no process of reasoning or canon of construction can these allegations be understood to charge that the defendant was operating the line of road on either of these latter dates. Neither the allegation that on the 21st day of June the defendant ran one of its trains over and upon a certain bull, etc., nor the allegation that on the 12th day of July the defendant ran one of its trains over and upon one certain two year old heifer, cures the want of an allegation that at the time of the killing the defendant was actually operating a line of railroad within the state of Idaho. The statute of Idaho, section 2680 of the Revised Statutes, as amended by an Act of the legislature approved March 7, 1901, provides that "every railroad company or corporation operating any line of railroad within this state that hereafter negligently maims or kills any horse, mare, * * * cow, heifer, bull, etc., by running any engine or engines, car or cars, over or against any such animal or animals is liable to the owner of such animal or animals," etc. In order to bring himself within the provisions of this statute it was necessary for the plaintiff to allege that at the time of the killing the defendant company was operating a line of railroad within the state of Idaho. (*Baker et al. v. Southern Cal. Ry. Co.*, 114 Cal. 501, 46 Pac. 604.)

3. The same section of the Idaho statute above referred to further makes the killing or maiming of an animal by the railroad company *prima facie* evidence of negligence on the part of the railroad company, and then contains this proviso: "Provided, that a claim in writing for such damages signed by the owner or his agent must be made upon such railroad company or corporation within three months after such maiming or killing." The allegation of the first cause of action in this regard is: that "this plaintiff presented to the defendant and its agents, servants and employees a certain claim for the price and value of said bull, but that the defendant has wholly failed and refused to pay the same or any part thereof," etc. The allegation of the second cause of action is: "that within ninety days of the date of said killing plaintiff demanded

of the defendant payment for said heifer, but defendant has and still refuses to pay for the same," etc. No pretense is made that either of these allegations complies, even substantially, with the requirements of the section of the Idaho Code above referred to.

Where one seeks the advantageous position afforded by the statute which relieves him of a burden which otherwise he would be called upon to assume, he must bring himself squarely within the terms of the statute. The Idaho statute above referred to, in effect said to this plaintiff: You ask relief from pleading or proving negligence on the part of the railroad company. It is only necessary for you to show in this regard that the defendant company was operating a line of railroad in the state of Idaho, and that while so doing it killed your animals. In the absence of this statute you would be called upon to plead and prove negligence on the part of the defendant company; but you are relieved from this, provided that within ninety days after the killing you make demand in writing, signed by yourself or agent, upon the company for damages you sustained; otherwise the benefits conferred by this statute are not available to you. The particular action brought by this plaintiff is a statutory one, and he must stand or fall by the statute which he invokes. (17 Ency. of Pl. & Pr. 572, and cases cited.)

For the reasons given, the judgment is reversed and the cause remanded.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

METLEN, RESPONDENT, v. OREGON SHORT LINE RAILROAD COMPANY, APPELLANT.

(No. 2,149.)

(Submitted June 23, 1905. Decided July 24, 1905.)

Railroads—Killing Livestock—Fences—Complaint—Trial—Opening Statement—Grounds of Recovery—Waiver.

Trial—Opening Statement—Grounds of Recovery—Waiver.

1. Where, in an action against a railroad company for killing livestock, plaintiff's counsel at the opening of the trial stated to the court that he relied on the cause of action set out in his complaint, relative to a defective fence, he thereby waived any other ground for recovery mentioned in the complaint.

Railroads—Killing Livestock—Fences—Complaint.

2. A complaint in an action against a railroad company for the killing of livestock, which fails to allege plaintiff's ownership or possession of the land along or through which the railroad runs at the point where the animals were killed, fails to state facts sufficient to constitute a cause of action. (*Beaudin v. Oregon Short Line R. Co.*, 31 Mont. 238, 78 Pac. 303.)

Appeal from District Court, Beaverhead County; M. H. Parker, Judge.

ACTION by David E. Metlen against the Oregon Short Line Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Mr. John G. Willis, for Appellant.

Mr. Edwin Norris, for Respondent.

PER CURIAM.

This is an appeal from a judgment in favor of the plaintiff. The plaintiff sued the defendant for the value of livestock alleged to have been killed by its cars at and on the ranch of Joseph Shineberger, near Redrock station, in Beaverhead county, Montana; it having "neglected and failed to maintain a good and sufficient fence (the said place then and there being a place where the said defendant could and had the right to

maintain a good and sufficient fence) on one side of its track and property, sufficient to prevent cattle and other domestic animals from straying and going upon the said track and railroad." It is alleged that the livestock on March 1, 1903, "by reason of the omission of said defendant to then and there maintain a good and sufficient fence, without any fault or knowledge on the part of the plaintiff, strayed upon the line and track of said railroad, and were run against and killed by the locomotive and cars," etc.

At the opening of the trial, plaintiff stated to the court that "he relied upon the cause of action set out in his complaint, relative to a defective fence," thus waiving any other ground of recovery mentioned in the complaint.

The defendant assigns that the complaint does not state facts sufficient to constitute a cause of action. For the reasons stated in the opinion in *Beaudin v. Oregon Short Line Railroad Co.*, 31 Mont. 238, 78 Pac. 303, relating to the law in Montana as to railroad fences, the judgment is reversed.

Reversed.

**HICKEY ET AL., RESPONDENTS, v. ANACONDA COPPER
MINING COMPANY ET AL., APPELLANTS.**

(No. 2,064.)

(Submitted March 15, 1905. Decided July 24, 1905.)

*Mines—Action to Quiet Title—Ore Bodies—Trial by Jury—
Appeal—Review of Evidence—Assignments of Error—Rec-
ord—Exhibits—Certificate of Judge—Extralateral Rights—
Declaratory Statements—Patents—Doctrine of Relation.*

Mines—Action to Quiet Title—Ore Bodies—Jury Trial.

1. In an action brought for the purpose of quieting title to ore bodies, the parties are not entitled, as a matter of right, to a trial by jury.

Appeal—Review of Evidence—Assignments of Error—Briefs.

2. On appeal from a decree and an order denying a motion for a new trial, in an action to quiet title to ore bodies, the supreme court

may review the evidence to determine whether or not it supports the findings and decree, although the order of the trial court denying the motion for a new trial is not specified as error in appellant's brief.

Appeal—Review of Evidence—Record—Exhibits.

3. While ore samples introduced as exhibits in the trial of a case may be brought to the supreme court as original exhibits, under the rules of that court, yet they are not required to be taken up as a part of the evidence in the case on review.

Appeal—Record—Contents—Evidence.

4. Code of Civil Procedure, section 1173, does not require that the record on appeal must show that it embraces *all* the evidence introduced at the trial of the case, but only such as is necessary to make the statement truly represent the case.

Appeal—Record—Exhibits—Certificate of Judge—Imports Verity.

5. In the absence of any showing that exhibits, alleged to have been omitted from the record on appeal are material to the consideration of the appeal, the certificate of the presiding judge will be accepted by the appellate tribunal as importing verity, and the statement considered as containing all the matter necessary to make it truly represent the case.

Mines—Extralateral Rights—Discovery Shaft—Location—Cross-examination.

6. In an action to determine extralateral rights, one of the questions in controversy was whether the discovery vein extended lengthwise of the claim, intersecting its end lines, or whether it extended diagonally across the claim through both of its side lines. One of the locators, on direct examination, testified that he and his associates had discovered a vein within the surface lines of the claim, had sunk a discovery shaft thereon, and could trace the vein in an easterly and westerly direction. On cross-examination he further stated that a second shaft was sunk on the claim in a northwesterly direction from the discovery shaft. An objection was sustained to the further question whether this second shaft was sunk on the discovery vein. *Held*, that the statements of the witness on direct examination authorized his cross-examination relative to the location of the discovery shaft, the course or strike of the discovery vein, the location and character of the assessment work done on the claim which might have thrown light on the issue of the course of the vein, and whether, as a fact, the discovery shaft was actually sunk on the vein.

Mines—Expert Witnesses—Prospectors.

7. A question asked of a locator of a mining claim, in an action to quiet title to ore bodies, whether a certain shaft had been sunk on the discovery vein, did not call for expert or opinion testimony, so as to bring the witness within a stipulation by which each side agreed to confine itself to a certain number of geological and expert witnesses.

Mines—Location—Patents—Evidence—Findings.

8. In an action to determine extralateral mining rights, evidence *held* insufficient to support a finding that the location of plaintiff's claim was prior to the location of either the O. or N. claims, and that the patent to plaintiff's claim was issued prior to the patents to such other claims.

Mines—Declaratory Statement—Verification—Statutes—Constitutionality.

9. The Act of 1873 (Laws Extra. Session, 1873, p. 83) declaring that

any person who shall discover any mining claim upon any vein or lode bearing gold, silver, etc., shall, within twenty days thereafter, make and file for record in the recorder's office of the county in which the discovery is made a declaratory statement thereof in writing, on oath, describing such claim in the manner provided by the laws of the United States, etc., was not unconstitutional, as in conflict with United States Revised Statutes, section 2324 (U. S. Comp. Stats. 1901, p. 1426), which does not require the notice or declaratory statement to be verified.

Mines—Declaratory Statement—Insufficiency.

10. *Held*, under Act of 1873 (Laws Extra. Session, 1873, p. 83) requiring declaratory statements to be verified on oath of the locator, recorded, etc., "in the manner provided by the laws of the United States" (Rev. Stats., sec. 2324), that a verification reciting that the subscribers, who, being first duly sworn, on oath said, each for himself, that he was of lawful age, a citizen of the United States and that the foregoing notice by them subscribed was a true copy of the original notice of location of the claim "above described, as posted thereon on the day therein stated," was fatally defective.

Mines—Location—Patent—Doctrine of Relation.

11. The question whether a patent to a mining claim relates back to the date of its location must be determined by the facts of each particular case.

Mines—Patent—Not Conclusive—Of What Fact.

12. The patent to a mining claim is not conclusive of the fact that a declaratory statement in due form of law was filed for record.

Mines—Patent—Doctrine of Relation.

13. Where the declaratory statement, filed in support of a mining location was void, the patent subsequently issued did not, by relation, give validity to the location at a date antecedent to the application for the patent.

Mines—Extralateral Rights—Decree.

14. A decree entered in an action to quiet title to certain ore bodies, awarding extralateral rights within planes in fan shape, was erroneous.

Appeal from the District Court, Silver Bow County; Wm. Clancy, Judge.

ACTION by Edward Hickey and others against the Anaconda Copper Mining Company and another. From a judgment in favor of plaintiffs, and from an order denying them a new trial, defendants appeal. Reversed.

Mr. John J. McHatton, Messrs. Bach & Wight, and Mr. James M. Denny, for Respondents.

It is held by all modern decisions and text-writers that the statute giving the right to extralateral pursuit of a vein should be liberally construed and upheld whenever possible. In case of doubt the doubt should be resolved in favor of the right to

pursue the vein extralaterally. (*Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.*, 63 Fed. 540; *Del Monte M. & M. Co. v. Last Chance M. & M. Co.*, 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72.) Where it appears that a vein has its apex in a claim and that, so far as developed, it trends in the direction of the end lines, it is presumed to pass through them. (*Armstrong v. Lower*, 6 Colo. 393, 581.) This doctrine has been so liberally applied as to give the older location the right to the entire vein on its dip, where the apex is bisected by the side line of the claim. (*St. Louis M. & M. Co. v. Montana Min. Co.*, 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725; *Empire State-Idaho M. & D. Co. v. Bunker Hill & S. M. & C. Co.*, 121 Fed. 973, 58 C. C. A. 311; *Last Chance Min. Co. v. Bunker Hill & S. M. & C. Co.*, 131 Fed. 579.) The courts have also been liberal in defining what constitutes a vein. (*Hyman v. Wheeler*, 29 Fed. 347, 353; *Iron Silver Min. Co. v. Chessman*, 116 U. S. 529, 6 Sup. Ct. 481, 29 L. Ed. 712; *Shreve v. Copper Bell Min. Co.*, 11 Mont. 309, 28 Pac. 315.)

And all this to the purpose that the locator may have the benefit of the law and all rights attaching to his location. (See, also, Snyder on Mines, secs. 781, 790, 792, 803.)

The evidence cannot be reviewed because the same was brought before the lower court on motion for new trial, and it is not assigned that the trial court erred in overruling said motion. This court has repeatedly held that the sufficiency of the evidence to support a verdict or judgment cannot be considered where there is no motion for a new trial. (*Beatty v. Murray Placer Min. Co.*, 15 Mont. 314, 39 Pac. 82; *Blessing v. Sias*, 7 Mont. 103, 106, 14 Pac. 663; *Kleinschmidt v. Iler*, 6 Mont. 122, 124, 9 Pac. 901; *Adler Gulch Min. Co. v. Hayes*, 6 Mont. 31, 9 Pac. 581; *Twell v. Twell*, 6 Mont. 19, 9 Pac. 537; *Largey v. Sedman*, 3 Mont. 472, 475; *Allport v. Kelley*, 2 Mont. 343; *Princeton Min. Co. v. First Nat. Bank*, 7 Mont. 530, 535, 19 Pac. 210; *Lloyd v. Sullivan*, 9 Mont. 577, 588, 24 Pac. 218.)

After a statement on motion for a new trial, embodying the testimony, has been submitted to the trial court, on motion for a new trial, and the motion overruled, can such statement be considered on appeal, so as to permit this court to review the evidence, where it is not assigned that the trial court erred in overruling the motion for a new trial? We submit not, as it logically follows, from the rulings of this court above referred to, that such use cannot be made of it. (*Withers v. Kemper*, 23 Mont. 432, 65 Pac. 422.) The review on appeal is confined to the consideration of such matters as may be presented to the trial court. (*Campbell v. Great Falls*, 27 Mont. 37, 69 Pac. 114.) Unless all the evidence is in the record the evidence cannot be considered. (*Ramsey v. Burns et al.*, 27 Mont. 154, 69 Pac. 711.) This court will not consider any error except those assigned. (*Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714; *State v. Whaley*, 16 Mont. 574, 41 Pac. 852; *Hutton v. Reed*, 25 Cal. 478.) All errors not assigned are considered to be waived. (*Gila R. I. Co. v. Wolfley*, 3 Ariz. 176, 24 Pac. 257.) Even where error is assigned, but not argued, it is deemed waived. (*Maloney v. King*, 25 Mont. 188, 64 Pac. 351; *King v. Pony Gold Min. Co.*, 28 Mont. 74, 92, 93, 72 Pac. 309; *Hayes v. Union Mer. Co. et al.*, 27 Mont. 264, 70 Pac. 975; *Elliott v. Martin et al.*, 27 Mont. 519, 71 Pac. 756.)

Even though the errors are specified in the motion for a new trial, they cannot be considered unless error is assigned to the action of the court in overruling the motion. (*Terre Haute v. Fagan*, 21 Ind. App. 371, 52 N. E. 457; *Carson v. Frink*, 27 Kan. 524; *Case v. Jacobitz*, 9 Kan. App. 842, 62 Pac. 115; *Chicago etc. R. Co. v. German Ins. Co.*, 2 Kan. App. 395, 42 Pac. 594, and great list of cases cited.) Rulings which properly constitute causes for a new trial cannot be assigned independently as specifications of error in the reviewing court. (*Crowfoot v. Zink*, 30 Ind. 446; *Maybin v. Webster*, 8 Ind. App. 547, 35 N. E. 194, 36 N. E. 373; *Merchants' etc. Bank v. Fraye*, 9 Ind. App. 161, 53 Am. St. Rep. 341, 36 N. E. 378; *Hunt v. Listenberger*, 14 Ind. App. 326, 42 N. E. 240.)

Matters assignable as grounds for a new trial cannot be made the subject of independent assignments of error in the reviewing court, but must be embraced in a motion for a new trial, and then the action of the trial court in overruling the motion assigned as error; otherwise, the evidence cannot be considered or reviewed. (*New Albany v. Slider*, 21 Ind. App. 392, 52 N. E. 626; *Hunt v. Listenberger*, *supra*; *Merchants' etc. Bank v. Fraye*, *supra*; *Johnson v. Badger L. Co.*, 8 Kan. App. 580, 55 Pac. 517; *Wright v. Darst*, 8 Kan. App. 492, 55 Pac. 516; *Walter A. Wood etc. Co. v. Farnham*, 1 Okla. 375 33 Pac. 867; *Wolcott v. Bachman*, 3 Wyo. 335, 23 Pac. 72. 673; *United States v. Trabing*, 3 Wyo. 144, 6 Pac. 721; *Gandy v. Cummins*, 64 Neb. 312, 89 N. W. 777.)

The record does not contain all of the evidence, and therefore the evidence cannot be reviewed. A general statement in a bill of exceptions that it contains all of the evidence will not control when it appears from the body of the bill that evidence is omitted therefrom. (*Benton v. Beakey* (Kan.), 78 Pac. 410; *Rhea v. Crunk*, 12 Ind. App. 23, 39 N. E. 879; *Farr v. Bach*. 13 Ind. App. 125, 41 N. E. 393; *Merrifield v. Weston*, 68 Ind. 70; *T. C. Power & Bro. v. Stocking*, 26 Mont. 478, 68 Pac. 857; *Garrity v. Hamburger Co.* (Ill.), 28 N. E. 743; *State v. School Dist. No. 3*, 14 Wash. 222, 44 Pac. 270; *Hart v. Hart*, 74 Iowa, 487, 38 N. W. 375; *Acker Post, No. 21, G. A. R. v. Carver*, 23 Minn. 567; *Huston v. McCloskey*, 76 Ind. 38; *Jennings v. Durham*, 101 Ind. 391; *Marvin v. Sager*, 145 Ind. 261, 41 N. E. 310; *Finlen v. Heinze*, 28 Mont. 548, 73 Pac. 123.) A judge's certificate cannot, under the statute, have the effect of certifying that it contains all the evidence. (*Exendine v. Goldstine* (Okla.), 77 Pac. 45; *Kane v. Kane*, 35 Wash. 517, 77 Pac. 842; *Smith v. Alexander*, 67 Kan. 862, 74 Pac. 240; *Clay v. Clark*, 76 Ind. 163; *Brown v. Johnson*, 14 Kan. 377.) All the evidence must be in the record. (*Ramsey v. Burns*, 27 Mont. 154, 69 Pac. 711.)

Mr. A. J. Shores, Mr. W. W. Dixon, Mr. C. S. Thomas, Mr. C. F. Kelley, Messrs. Forbis & Evans, and Mr. D. Gay Stivers, for Appellants.

Equity being without jurisdiction to try the question at bar (*Kennedy v. Elliot*, 85 Fed. 832; *Dice v. McCauley*, 22 Or. 456, 30 Pac. 160; *Love v. Morrill*, 19 Or. 545, 24 Pac. 916; *Wetherbee v. Dunn*, 36 Cal. 249; *Wilson v. Hart*, 98 Mo. 618, 12 S. W. 249), certainly, the action was one at law, and defendant was entitled to a trial by jury. (4 Am. & Eng. Ency. of Law, 838, 839; *Tabor v. Cook*, 15 Mich. 322; *Newman v. Duane*, 89 Cal. 597, 27 Pac. 66; *Hughes v. Dunlop*, 91 Cal. 385, 27 Pac. 642; *North Pennsylvania Coal Co. v. Snowden*, 42 Pa. St. 488, 82 Am. Dec. 530; *Davis v. Morris*, 36 N. Y. 569.)

The appellants contend that while the patent may be conclusive evidence of the fact that a location had been duly made in accordance with law, where the patent is silent, as in this case, as to the date of location, the patent does not prove the date of location, but simply the fact that a location upon which the patent issued has been duly made; and that when plaintiffs undertook for the purpose of establishing their priority of location, in order to become the owners of veins found below a point of junction, as they did in this case, it was incumbent upon them to prove the date by the introduction of a valid notice of location. The date of location became in this case an important fact for the purpose of determining the priorities of the parties. The date, therefore, in this connection was not a matter in the chain of title of the plaintiffs, but was a separate, independent and distinct fact which could only be proved by the introduction of competent evidence with reference thereto. The notice of location offered was void under the decisions of this court.

The notice of location, having been void, it was incapable of initiating a right, for *void* means of no legal effect, and such being the case, it was also error to admit in evidence

an amended location of the Nipper lode claim, because an amended location cannot be predicated upon a void location. (Lindley on Mines, sec. 397; also, sec. 398; *Moyle v. Bullene*, 7 Colo. App. 308, 44 Pac. 69.)

That the patent only relates back and shuts out intervening rights from the date of entry, see *In re American Hill Quartz Mine*, 3 Sickles, Min. Dec. 377, s. c. Commrs.' Dec., 3 Sickles, Min. Dec. 384; *Gold Blossom Quartz Mine*, 2 L. D. 767; *American Hill Quartz Mine*, 5 Copp's L. O. 114, 6 Copp's L. O. 1; *Aurora Hill Cons. M. Co. v. '85 Mining Co.*, 34 Fed. 514; *Deno v. Griffin*, 20 Nev. 249, 20 Pac. 308; *Alta M. & S. Co. v. Benson M. & S. Co.*, 2 Ariz. 362, 16 Pac. 565; *Benson M. Co. v. Alta M. & S. Co.*, 145 U. S. 428, 12 Sup. Ct. 87, 36 L. Ed. 762; *Deffaback v. Hawke*, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The plaintiffs in this action assert their ownership in, and right of possession to, an undivided thirty-one thirty-sixths interest in the Nipper lode mining claim. They allege that there is in said claim a vein bearing copper and other minerals, which vein extends lengthwise of said claim, substantially parallel with the side lines and through the end lines of said claim, which end lines are parallel; that said vein so far departs from a perpendicular in its descent into the earth that it extends beyond the south side line of the Nipper claim and into the Oden claim, owned by the defendant Washoe Company, and also into the Anaconda and Neversweat claims, owned by the defendant Anaconda company; and that these defendants have entered upon and have mined and extracted ores from said Nipper vein. The prayer of the complaint is that the defendants be required to set forth their respective claims, that the title of plaintiffs to the ores in said vein be quieted, and for an injunction *pendente lite*, and that upon final determination a decree be entered, among other things, enjoining

the defendants from asserting any interest in said vein or in the Nipper claim.

The answer of defendant Washoe company admits many of the allegations of the complaint, and alleges that the vein in the Nipper claim, called by the plaintiffs the Nipper vein, extends in a northwesterly and southeasterly direction across said Nipper claim, intersecting its side lines. It avers its ownership to the Oden claim, and that it is entitled to the possession of all the veins and ore deposits lying within the vertical boundaries of said Oden claim.

The answer of the defendant Anaconda company asserts its ownership to the Anaconda and Neversweat claims; admits many of the allegations of the complaint, but denies any knowledge or information sufficient to form a belief as to whether or not there is within the Nipper claim any vein extending lengthwise of said claim, or intersecting either of its end lines; and denies that the plaintiffs are the owners of or entitled to any mineral in any vein, lead, or lode within the vertical planes or boundaries of either the Anaconda or Neversweat claims.

The affirmative allegations of these answers are put in issue by replications. Defendant Washoe company asked leave of court to make an amendment to its answer by adding thereto a counterclaim in the nature of a complaint in ejectment. This application was denied. Defendants also moved the court for a trial by jury, but this motion was overruled. Other proceedings were taken, which it is not necessary now to consider. The cause was tried to the court without a jury, and findings of fact and conclusions of law were made, and a decree entered in favor of the plaintiffs, from which decree and an order denying their motion for a new trial the defendants appealed.

1. Right of trial by jury. This case is not distinguishable in its character from the case of *Montana Ore Pur. Co. v. Boston & Montana Con. C. & S. Min. Co.*, 27 Mont. 288, 70 Pac. 1114; s. c. 27 Mont. 536, 71 Pac. 1005, known as the "*Pennsylvania*

Case," and the decision in that case is decisive of this question, adversely to the contention of the appellants. We see no reason to change our views therein expressed, but, on the contrary, particularly reaffirm the doctrine that in cases of this character the parties are not entitled, as a matter of right, to a trial by jury.

2. The power of this court to consider the evidence. It is contended by respondents that this court may not review the evidence to determine whether or not it supports the findings and decree, for the reasons (1) that the order of the court denying the motion for a new trial is not specified as error in appellant's brief; and (2) that the record does not contain all the evidence.

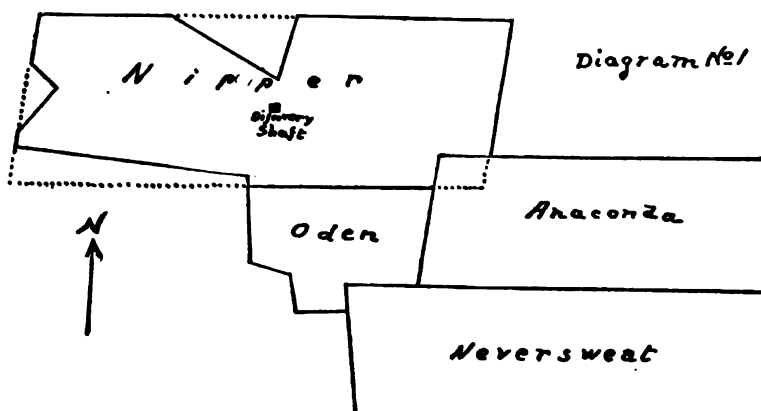
Whatever may be the rule in other jurisdictions, where the specifications of error relied upon are required to be contained in the petition in error, the rule that the order of the court denying the motion for a new trial must be assigned as error does not prevail in this jurisdiction. Our statute (Section 1171, Code of Civil Procedure) specifies the grounds upon which a motion for a new trial may be made. Of course, the statement which is presented to the lower court could not assign as error a ruling of that court not then made, and it could only be presented to this court by way of an assignment in the appellants' brief. But there is no reason whatever for this in this state, where an appeal lies directly from the order of the court denying a motion for a new trial. If the defendant in the court below has interposed a general demurrer to the complaint, and has stood upon his demurrer and suffered judgment to go against him, on appeal to this court an assignment that the court erred in overruling his demurrer will be considered by this court, and if found to be well taken, the judgment will be set aside. Likewise, if it be found that the evidence does not support the decision, or if in the course of the trial the court has committed errors prejudicial to the appellant, and those errors have been properly saved and presented to this court, they will be considered, and the order of the lower court set aside, and a new trial directed.

The judge of the district court certifies that the record contains all the evidence introduced upon the trial of this cause. But respondents contend that, notwithstanding this recital, certain ore samples and certain maps or plats used on the trial of this cause are not before this court on this review.

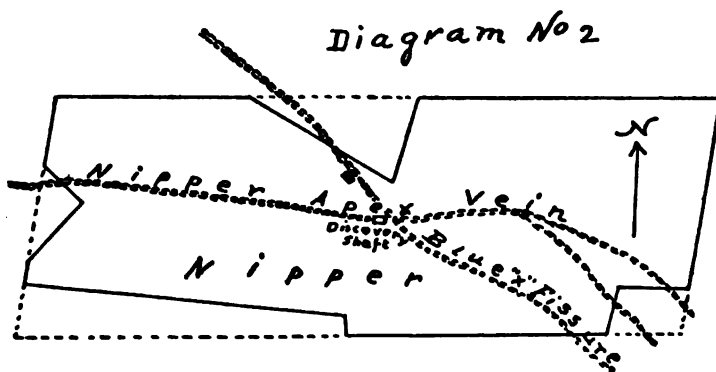
In the first place, the statute does not contemplate that ore samples shall be brought to this court for examination. They may be brought here as original exhibits under the rules of this court, but there is no requirement that they shall be. Furthermore, the statute (Section 1173, Code of Civil Procedure) does not contemplate that the record shall contain all the evidence which may have been introduced in the court below. On the contrary, it provides: "It is the duty of the judge or referee in settling the statement to strike out of it all redundant and useless matter, and to make the statement truly represent the case, notwithstanding the assent of the parties to such redundant and useless matter, or to any inaccurate statement." At least one of the exhibits which respondents contend is not before the court is in fact found in the record before us. In the absence of any showing that the other exhibits omitted are material to a consideration of this appeal, the certificate of the presiding judge will be accepted as importing verity, and the statement considered as containing all of the matter necessary to make it truly represent the case; and when this court has heretofore said that the record must show that it embraces all the evidence, the phrase "all the evidence" was used in the sense meant by the statute, viz., all the evidence necessary to make the statement truly represent the case.

3. Cross-examination of the witness Steward. As one of their witnesses, plaintiffs called John M. Steward, one of the original locators of the Nipper claim, and upon his direct examination asked him to identify the Nipper declaratory statement and the plat of that claim used in the Land Department upon application for patent. He was asked if he had anything to do with the making of the location of the Nipper claim, when it was located, whether there was any discovery of a vein made upon

the ground embraced in the surface lines of that claim, and what the locators did after discovery with reference to the possession of the claim. In answer to these questions the witness testified that he was one of the original locators; that the claim was located on the 16th day of October, 1875; that they did discover a vein upon the ground embraced within the surface lines of this claim; that they found there a wall and rock in place, sunk a discovery shaft, and traced the vein east and west; that after this they worked on the claim and represented it from year to year until they secured patent. Upon cross-examination he was asked if the locators did not sink another shaft on the claim northwest from the discovery shaft prior to their application for patent. He answered, "Yes," and stated that it was sunk in 1876 or 1877. He was then asked whether or not this second shaft was sunk upon the discovery vein. This question was objected to on the ground that it was not cross-examination, and the objection sustained. Thereupon defendants offered to prove by the witness that the shaft sunk northwest from the discovery shaft, and shown upon the plat of the ground used in making application for patent, was in fact sunk upon the vein in its northwesterly course from the discovery shaft; that this was done as a part of the assessment work prior to application for patent, and that the true course and direction or strike of the vein is represented by a line drawn from the discovery shaft to this second shaft, and continued in the same direction both northwest and southeast; and that this witness had testified that the course of the vein was in that direction upon a former hearing in the same court. This offer was likewise rejected, and these rulings of the court are counted errors by appellants here. So much of the plat with reference to which the witness was testifying as is necessary to illustrate the importance of this controversy is herewith reproduced. (See Diagram No. 1.)



When it is considered that the actual controversy, as shown by the pleadings, so far as the Washoe company is concerned, and by the testimony, so far as the Anaconda company is concerned, was as to whether the Nipper discovery vein extends lengthwise of the Nipper claim, intersecting its end lines, as contended by plaintiffs, and as represented in the annexed Diagram No. 2, as the "Nipper Apex Vein," or whether it extends diagonally across the Nipper claim through both of its side lines, as claimed by the defendants, and as represented on Diagram No. 2 by the "Blue X Fissure," it is difficult to under-



stand upon what possible theory the court proceeded in its ruling. The statement of the witness Steward on his direct examination that the locators—himself one of the number—had

discovered a vein within the surface lines of the Nipper claim, had sunk a discovery shaft upon it, and could trace the vein in an easterly and westerly direction, opened wide the door for any proper cross-examination relative to the location of the discovery shaft, the course or strike of the discovery vein, the location and the character of the assessment work done upon the claim which might have thrown light upon the question of the course of the vein, and whether, as a matter of fact, the discovery shaft was actually sunk upon the vein.

When we further consider the fact that this witness was one of the original locators of the Nipper claim, the importance of the offered proof cannot be overestimated. We must proceed upon the assumption that the defendants could have proved by the witness what they offered to prove and measure the importance of the court's ruling accordingly. If in fact they could have proved by this witness on his cross-examination that the second shaft sunk by the locators in a northwesterly direction from the discovery shaft was upon the same vein as the discovery shaft, and that the vein was in fact the discovery vein, it would have tended strongly to prove the defendants' contention, viz., that the discovery vein of the Nipper extends diagonally across the claim, intersecting the side lines; for this witness was upon the ground, helped to make the discovery and to sink these shafts and to do the assessment work necessary to secure the patent. His testimony would have been based upon actual conditions as they existed in 1875, and would not have been a mere expert opinion based upon conditions existing nearly thirty years afterward, when the surface of the claim had been so greatly changed by buildings erected upon it and by railroad embankments and cuts that the exact location of the discovery shaft had apparently become a mere matter of speculation. This is not an instance of immaterial testimony admitted in a court of equity, but of material testimony excluded, and the importance of it is further emphasized by the fact that the court found as a fact that the discovery was made upon the vein designated the "Nipper Apex Vein," running lengthwise of the Nipper claim, and intersecting its end lines.

At the commencement of the trial of this case the parties stipulated that each side should confine itself to five geological and expert witnesses, the stipulation particularly excepting from its provisions surveyors, draftsmen, assayers, samplers, or witnesses testifying to the nature or character of workings, or persons called to testify regarding the location of claims and facts connected therewith, etc.; and it is now said that this attempted cross-examination of the witness Steward was a disguised attempt on the part of the defendants to secure the testimony of an expert in addition to the number allowed by the stipulation. But the question asked did not seek for expert or opinion testimony, but facts were sought to be elicited respecting which any prospector or person familiar with the work done could testify. Furthermore, the stipulation itself excluded from its provisions just the character of testimony sought to be elicited from this witness.

4. In its fourth finding of fact the court declares that the location of the Nipper was prior to the location of either the Oden or Neversweat claims. We have searched the voluminous record in this case in vain for any reference whatever to the date of the location of the Neversweat claim, and are unable to find any testimony upon which this finding could have been based, so far as it affects the Neversweat claim, and counsel for plaintiffs have wholly failed to point out any reference to this matter in the record.

The same finding also declares that the patent for the Nipper claim was issued prior to the patents for either the Oden or Neversweat claims, and this finding is even more remarkable, for not only is there no evidence whatever as to when the patent to the Neversweat claim was issued, but the patent to the Oden claim, which is in evidence, shows upon its face that it was issued in January, 1886, while the patent to the Nipper claim, also in evidence, shows that it was not issued until June, 1886. So that this finding is not only unsupported by the evidence, but is made directly in the face of the evidence to the contrary, and evidence conclusive upon the court upon that subject.

5. In finding No. 8 the court particularly recognizes the existence of the Blue X Fissure, and by finding No. 12 concedes to the Washoe company all ores in said fissure within the Oden claim above the Nipper one hundred and fifty-foot level, but decrees all ores in said fissure below that level to the plaintiffs, on account of "the union thereof with the plaintiffs' Nipper vein." While there is no express finding that the Blue X Fissure is in fact a vein, or that it actually unites with the Nipper vein, yet the language employed by the court is not susceptible of any other construction. And this was apparently the theory of counsel for plaintiffs, although most of their witnesses denied that the Blue X Fissure is a vein, for plaintiffs thought it necessary to introduce in evidence the declaratory statement of the Nipper claim, and the only possible theory upon which they could have offered it, as it appears to this court, was to avail themselves of the doctrine of relation, and thereby show that, notwithstanding the patent for the Nipper claim was issued subsequently to that for the Oden, still, as a matter of law, the Nipper was the older claim, and therefore entitled to all minerals at the point of union or intersection of the Nipper vein with the Blue X Fissure, although that intersection occurred in Oden territory.

Upon the offer of this statement in evidence, defendants objected upon the ground that the same was void, for the reason that it was not verified as required by the laws of the territory of Montana in force at the date of filing of such statement. This objection was overruled, and exception saved. The verification to the Nipper declaratory statement is as follows: "John M. Steward and R. L. Liles, who being first duly sworn, on oath says each for himself that he is of lawful age, a citizen of the United States, and that the foregoing notice by them subscribed is a true copy of the original notice of location of the claim above described as posted thereon, on the day therein stated." The statute in force when this statement was presented for record provided: "Any person or persons who shall hereafter discover any mining claim upon any vein or lode, bearing gold, silver, cinnabar, lead, tin, copper, or other valu-

able deposits, shall, within twenty days thereafter, make and file for record in the office of the recorder of the county in which said discovery is made, a declaratory statement thereof in writing, on oath, before some person authorized by law to administer oaths, describing such claim in the manner provided by the laws of the United States." (Laws of 1873, Extra. Session, page 83.)

The federal statute under which this claim was sought to be located (Section 2324, Rev. Stats. [U. S. Comp. Stats. 1901, p. 1426]) does not require that the notice or declaratory statement shall be verified. In fact, it does not require that any notice or declaratory statement shall be filed for record at all, but merely provides that, if recorded, such notice or statement shall contain statements of certain facts. It has been suggested by certain text-writers upon Mining Law that the Montana statute was unconstitutional, in making this requirement; but we deem this question finally determined in favor of the validity of such statutes by the decision of this court in *Baker v. Butte City Water Co.*, 28 Mont. 222, 104 Am. St. Rep. 683, 72 Pac. 617, affirmed on appeal to the supreme court of the United States in *Butte City Water Co. v. Baker*, 196 U. S. 119, 25 Sup. Ct. 211, 49 L. Ed. 409.

Assuming, then, as we may rightly do, that the statute was constitutional, the invalidity of the Nipper declaratory statement becomes apparent. This question has been determined so often by this court that it cannot now be deemed open for further controversy. (*McCowan v. Maclay*, 16 Mont. 234, 40 Pac. 602; *Metcalf et al. v. Prescott et al.*, 10 Mont. 283, 25 Pac. 1037; *O'Donnell v. Glenn*; 9 Mont. 452, 23 Pac. 1018, 8 L. R. A. 629; s. c., 8 Mont. 248, 19 Pac. 302.)

Of the doctrine of relation it has been said by courts and text-writers that the proceedings in the Land Department leading up to and including the issuance of patent amount to an adjudication that all requirements of the law have been met. and the patent, when issued, relates back to the date of location. What is meant by "date of location" is not so easily determined. In this state, at least, "the law contemplates that the location

of a mining claim shall consist of a number of distinct acts, which are independent of each other. The last that may be done does not relate back to the first, and all must be performed before a legal location exists." (*Gonu v. Russell*, 3 Mont. 358; *McKay v. McDougall*, 25 Mont. at page 266, 87 Am. St. Rep. 395, 64 Pac. 672; *Lindley on Mines*, sec. 329.) "A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the Acts of Congress and the local laws and regulations." (*Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735.)

The acts which, taken together, amount to a location, begin with the discovery and terminate with the filing for record of the declaratory statement; and, as the location is not complete until such declaratory statement is filed, the date of its filing must of necessity be the date to which the patent relates. If, then, in this instance the Nipper declaratory statement was invalid, one of the essentials of a legal location was wanting, and a location, within the meaning of our law, was not effected, and there was not any date to which the Nipper patent could relate—at least, no date antecedent to the application for patent, which was the first intimation the government had that an attempt had been made to locate this claim.

But it is contended that the issuing of the patent was itself conclusive that the declaratory statement, notwithstanding its patent invalidity, was in fact valid, and authorities may be found to uphold this contention. Indeed, there are expressions in our own early decisions apparently sustaining this view. In *Lindley on Mines*, section 742, the doctrine is announced that in cases of mining patents the issuance of the patent is in effect an adjudication of all questions respecting matters which might have been the subject of an adverse claim, or, in other words where there is any surface conflict whatever, and there is a failure to adverse, after patent has issued to the applicant, the question of priority of his title is conclusively presumed. (*Empire State-Idaho Min. & D. Co. v. Bunker Hill & Sullivan Min. & C. Co.*, 114 Fed. 420, 52 C. C. A. 222.) But as we have here-

tofore said, the only instance, after patent, where the question of the date of location may arise, is when seeking to apply the doctrine of relation in connection with the particular patent, for the purpose of determining the ownership of minerals at the point of union or intersection of veins, as provided by section 2336 of the United States Revised Statutes (U. S. Comp. Stats. 1901, p. 1436). It is to be observed that under this section the ownership is to be determined by the priority of *title*. But the intersection of veins does not give rise to an adverse claim, within the meaning of that term as employed in the public land laws. (*Champion Min. Co. v. Consolidated Wyo. Gold Min. Co.*, 75 Cal. 78, 16 Pac. 513.) Indeed, it frequently occurs that such intersection or union is not discovered until long after patent has issued, and in any event an adverse claim only arises from surface conflicts.

The reason for adopting the rule of relation is apparent. For when the location is made in conformity with the provisions of the federal statutes, and in compliance with the state laws and local mining rules and regulations, it has the effect of withdrawing from the public domain the particular claim, and gives to the locator the right to the exclusive possession so long as he complies with the law. "The location, to be effectual, must be good at the time it is made. When perfected it has the effect of a grant by the United States of the right of present and exclusive possession." (*Belk v. Meagher, supra.*) And when the right thus initiated is further evidenced by patent, it is reasonable to relate the patent to the initiation, and protect the patentee against intervening rights. But if the locator did not proceed according to law, he did not initiate any right to which the patent could relate. Of course, the government, being the owner of the claim, may issue patent therefor upon such showing as Congress may see fit to exact. But Congress has not attempted to make such patent, when issued, retroactive in its effect, or relate back to any prior point of time, if, indeed, it might do so.

The doctrine of relation is a fiction of law, and whether a patent relates to the date of location is to be determined by the

facts of each particular case. It may be conceded that the patent is conclusive that everything has been done which the federal statutes require shall be done as condition precedent to patent, but we cannot believe that it is conclusive of matters with respect to which the government issuing the patent has not any concern.

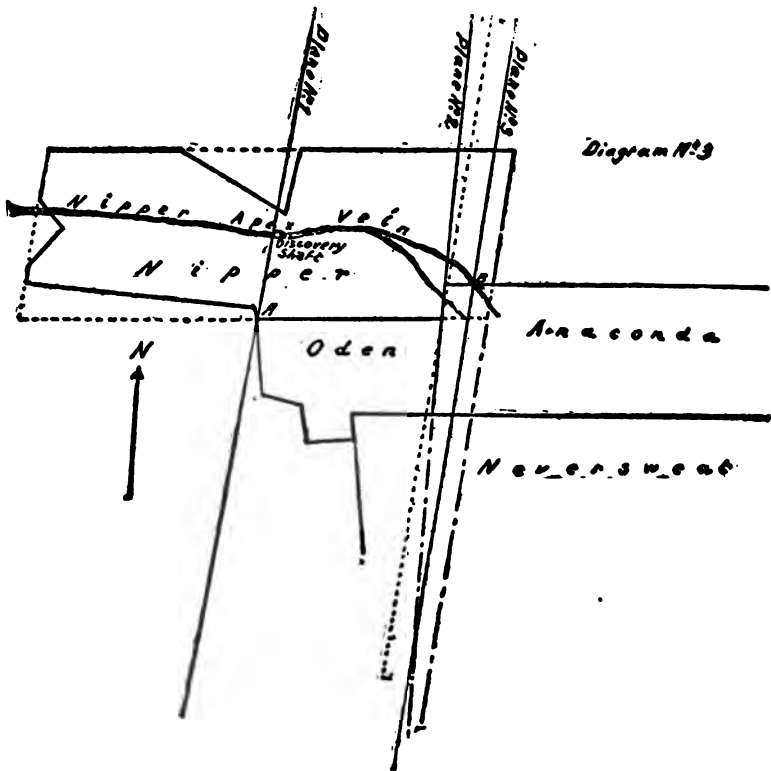
As indicating the liberality of the government in this regard, reference need only be had to the provisions of section 2332 of the United States Revised Statutes (U. S. Comp. Stats. 1901, p. 1433), under which it is not even necessary for the applicant for patent to show the initiation of his right at all, but merely possession and continuous working of the claim for a period equal to the statute of limitations of the state in which the claim is situated are sufficient, in the absence of an adverse claim, to entitle him to patent. If it be contended that the doctrine of relation applies to every patent, it is pertinent to inquire, to what date would a patent issued under the provisions of section 2332 above relate?

We are satisfied that the patent is not conclusive of the fact that a declaratory statement in due form of law was filed for record. In our judgment, when a patentee seeks to show that his title is older than the evidence of his title indicates—when he seeks to show that, notwithstanding the date of his patent or receiver's final receipt, his title in fact relates back to the date of his location, he must show affirmatively a location valid under the laws of the state where the claim is situated.

6. The court, by finding No. 9 and the decree, awards to the plaintiffs extralateral rights upon the Nipper vein between a plane drawn parallel with the east end line of the Nipper claim, passing through the northwest corner of the Oden claim at point A on Diagram No. 3, and a plane drawn through the west end line of the Anaconda claim, and extended south to an intersection with the south side line of the Anaconda. As the west end line of the Anaconda and the east end line of the Nipper are not parallel (if the maps used upon the trial are correct), it is difficult to understand upon what theory plane

No. 2 was drawn through the west end line of the Anaconda. This gives to the plaintiffs extralateral rights within Oden territory upon the Nipper vein within planes extended in fan shape. This cannot be justified upon any principle of law with which we are acquainted.

Furthermore, finding No. 9 and the decree also award to the plaintiffs extralateral rights upon the north prong of the



Nipper vein between plane No. 1, passing through the point A, and a plane drawn parallel with the east end line of the Nipper, cutting the north side line of the Anaconda at point B, and extended to an intersection with said north prong; and upon the theory adopted by the court, we think this is correct. But the court, in its award to the Nipper claim of extralateral rights, then proceeds further as follows: "And also all the ex-

terior part of the said Nipper vein, including all of its parts, spurs and branches south of the plane of the south side line of the said Anaconda lode claim, lying between the last-mentioned planes extended to an intersection therewith." The "last-mentioned planes" referred to are planes Nos. 1 and 3, but the term "Nipper vein," referred to, is more difficult to understand. In this subdivision of finding No. 9, wherever the north prong of the Nipper vein is mentioned, it is appropriately referred to as the "northerly prong or branch," or "said branch or part," while the Nipper vein (meaning the entire vein before the split occurs, or both prongs afterward) is referred to as the "Nipper vein," or "said vein, lead, lode, or ledge," and if the court used the term "Nipper vein" in the portion of finding No. 9, quoted above, in the sense of including both prongs—and it would appear that it could not have been used in any other sense—it is even more difficult to understand this portion of the finding, or to justify the decree made in conformity therewith; for this amounts to an award to the Nipper of extralateral rights upon both branches or prongs of the Nipper vein between plane No. 3 and a plane drawn parallel therewith through the northwest corner of the Anaconda, shown by the dotted line or plane on Diagram No. 3, wherever on their dip these prongs or branches pass under the Neversweat surface, and this notwithstanding the Anaconda has the apex of the south prong from the point where that prong crosses its west end line. We cannot imagine upon what theory the court proceeded in this regard. Counsel for respondents, in their brief, say: "The north part or prong of the Nipper vein must, of necessity, in its downward course, become identified with the mineralization, shown in the south prong. The developments to the west and to the deep show that this condition must follow." But the court did not find that there is in fact a union of the two prongs of the Nipper vein within the Neversweat claim, and if it had, the finding and decree in this regard could not be upheld, for the Anaconda claim is confessedly prior in right to the Nipper, as patent for the Anaconda was issued

April 29, 1882, and, while not so specifically decreed, the Anaconda is clearly the owner of the apex of the south prong of the Nipper vein from the point where that prong crosses the Anaconda west end line, and entitled to extralateral rights upon that portion of said south prong. And if there is in fact a union of these two prongs or branches within Neversweat territory, the ownership of the minerals at the point of union between plane No. 3 and plane No. 2 extended in its own direction would depend upon priority of title as between the Nipper and Anaconda, under the provisions of section 2336 of the United States Revised Statutes (U. S. Comp. Stats. 1901, p. 1436.)

In our consideration of this appeal we have refrained from considering the question of the sufficiency of the evidence to support the findings or decree, except so far as the contrary appears, but have proceeded upon the assumption that the findings are supported by the evidence. We have considered the other errors assigned, but deem them without merit.

For the reasons herein given, the judgment and order overruling defendants' motion for a new trial are reversed, and the cause remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY: I concur in the result. I am in doubt, however, as to the time to which the title by patent relates—whether to the date of the completed location, or to the date of discovery. I am inclined to think it relates to the latter. As a decision of this point is not necessary, I refrain from expressing an opinion.

MR. JUSTICE MILBURN concurs.

Rehearing denied October 12, 1905.

IN RE POMEROY.

(No. 2,150.)

(Submitted June 24, 1905. Decided July 24, 1905.)

*Escheats—Limitations—Statutory Construction—Recovery of Escheated Property—Retroactive Effect of Statutes.***Escheated Estates—Recovery—Limitations—Statutory Construction.**

1. Under the provisions of Political Code, section 5162, the limitation of twenty years prescribed by the Code of Civil Procedure, section 2253, within which to file petition in the district court to determine one's heirship to escheated property, is exclusive, and the limitation periods prescribed for ordinary actions have no application to such a proceeding.

Escheated Estates—Recovery—Statutes.

2. Sections 1867-1869, inclusive, of the Civil Code, granting the right of succession to aliens and providing a mode by which non-resident aliens can be paid out of the treasury of the state, under certain limitations, after property of their ancestor has been converted and its proceeds turned over to the state treasurer, have no application to cases in which citizens of the United States appear as claimants.

Escheated Estates—Recovery—Statutes—Retroactive Effect.

3. *Held*, under Code of Civil Procedure, section 3451, which declares that no part of said code is retroactive, unless expressly so declared, that property reduced to possession by the state in escheat proceedings prior to the enactment of the Code of Civil Procedure of 1895, cannot be recovered by the heir in a proceeding under section 2253 thereof.

Appeal from District Court, Lewis & Clark County; Henry C. Smith, Judge.

PETITION by William B. Pomeroy to determine his heirship to Thomas M. Pomeroy, deceased, and for an order directing a fund escheated to the state, and in the hands of the state treasurer, to be paid to petitioner. From an order granting the relief prayed for, the state appeals. Reversed.

Messrs. Toole & Bach, and Bach & Wight, for Respondent.

Mr. Albert J. Galen, Attorney-General, and Mr. F. W. Mettler, for Appellant.

. MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The purpose of this proceeding is to obtain an order directed to the state auditor to draw his warrant on the state treasurer, payable to the petitioner, for the sum of \$14,783.73, alleged to be due him as the sole heir of Thomas M. Pomeroy, deceased, who died intestate in Deer Lodge county on October 9, 1882, leaving an estate in Missoula county, which having escheated to the state of Montana, was converted into money and deposited in the state treasury.

The facts alleged in the petition are the following: The petitioner was born in the city of Boston, Massachusetts, on August 11, 1845, and is a legitimate son of Thomas M. and Elizabeth C. Pomeroy. The wife died on March 28, 1848, leaving two children surviving her—the petitioner and a sister, Susan Jane, who died at the age of seven years. Subsequent to the death of Elizabeth C. Pomeroy, Thomas M. was twice married, but had no other children, so that the petitioner is his sole heir and successor to his estate. As early as 1879 the father was residing in Missoula county, territory of Montana, and continued to reside in the territory until his death. One William McWhirk administered upon his estate by appointment by the probate court of Missoula county. On July 17, 1889, the administrator filed his account, which was approved. There remained in his hands as assets of the estate the sum of \$372.15 in cash, and a lot of land situate in the town of Missoula. The administrator had no knowledge that the deceased had left a son or other kindred, and, as no claimant appeared, the court entered an order that the deceased had left surviving him no heir or heirs, so far as could be ascertained, who were entitled to succeed to the residue of the estate. Thereupon the county attorney of Missoula county, by a proceeding instituted for that purpose, procured an order of the district court declaring that the property belonging to the estate had escheated to the territory of Montana, and directing that the real estate be sold, and the proceeds of the sale, together with the sum of money still in

the hands of the administrator, deposited in the treasury of the territory. This order was made on November 4, 1889. Under its direction the property was sold, and the entire residue of the estate, amounting to \$14,783.73, was deposited with the state treasurer on March 14, 1890; the territory having in the meantime been admitted into the Union as a state. During all the times mentioned the petitioner was a nonresident of the territory or state, and had no knowledge of the death of Thomas M. Pomerooy. He was not a party or privy to any of the probate or escheat proceedings, and had no notice thereof until a short time prior to the institution of this proceeding, on December 15, 1902.

The petition was filed in the district court of Lewis and Clark county, under the provisions of section 2253 of the Code of Civil Procedure, to have the heirship of the petitioner determined, and for an order directing the fund in the hands of the state treasurer to be paid to him. The attorney general appeared in the district court, and, while admitting the relationship of the petitioner to the deceased, resisted the application on various grounds—among others, that the petition does not state facts sufficient to warrant the relief demanded, that the court was without jurisdiction, and that the claim of the petitioner is barred by the statute of limitations. These contentions were all overruled, and on December 17, 1904, the court made and entered the order prayed for. The state has appealed.

Counsel in their briefs have covered a wide range, discussing many points which, though interesting, are not pertinent. It will be observed that the proceedings to have the escheat declared and the funds derived from the estate paid to the state treasurer took place before the adoption of the present Code; and, for authority for them, reference would have to be made to the Compiled Statutes of 1887. Both the petitioner and the state, however, assume that these proceedings were regularly conducted, and that the fund in controversy properly found its way into the hands of the state treasurer. The attitude thus assumed by counsel relieves the court from the necessity of de-

ciding any but the sole question whether or not the order sought is authorized by the provisions of section 2253, *supra*.

The Title (Title VIII, Part III, Code of Civil Procedure) of which this section is a part, has to do with escheated estates. and lays down the procedure by means of which they may be disposed of, and the proceeds covered into the state treasury. Section 2253 provides: "Within twenty years after judgment in any proceeding had under this Title, a person not a party or privy to such proceeding may file a petition in the district court of the county in which the seat of government is located, showing his claim or right to the property, or the proceeds thereof. A copy of such petition must be served on the attorney general at least twenty days before the hearing of the petition, who must answer the same; and the court must thereupon try the issue as issues are tried in civil actions, and if it be determined that such person is entitled to the property, or the proceeds thereof, it must order the property, if it has not been sold, to be delivered to him, or if it has been sold and the proceeds paid into the state treasury, then it must order the auditor to draw his warrant on the treasury for the payment of the same, but without interest or cost to the state, a copy of which order, under the seal of the court, shall be a sufficient voucher for drawing such warrant. All persons who fail to appear and file their petitions within the time limited are forever barred.

* * * "

We deem it hardly necessary to remark that, under the rules of construction applicable to the provisions of these Codes (Political Code, section 5162), the limitation prescribed by this section is exclusive, and that no reference need be made to the contentions of counsel touching the limitations prescribed for ordinary actions. If the present application has been made within the period here prescribed, it is within the time. It is apparent that it has, if the facts stated bring it within the purview of the section. The question therefore is: Does the statute apply to the case presented? The Compiled Statutes of 1887 contain no similar provision, nor any provision by which,

after it had been judicially declared that property had escheated to the state, and its proceeds had been reduced to possession and covered into the state treasury, the tardy heir could get relief. If he had any remedy at all, it was through the legislature, or by some mode of procedure other than by authority of the statute. By express provisions of these statutes, aliens were granted the right of succession, and a mode was provided by which non-residents of this class could be paid out of the treasury of the state or territory, under certain limitations, after the property had been converted and its proceeds paid to the treasurer. (Compiled Statutes of 1887, Second Division, sections 553, 555.) Substantially the same sections are found in the Civil Code of 1895 (Sections 1867-1869), but these are special and exclusive provisions, and have no application to cases in which citizens of the United States appear as claimants.

Upon the facts stated, the fund in question was paid into the state treasury on March 14, 1890, and by virtue of proceedings had in the district court resulting in an order of sale made November 4, 1889. The present Act became operative on July 1, 1895. No relief can be had under it unless it should be held to operate retroactively. Sections 3450 and 3451 of the Code of Civil Procedure declare:

"Sec. 3450. This Code takes effect at 12 o'clock noon on the first day of July, A. D. 1895.

"Sec. 3451. No part of it is retroactive, unless expressly so declared."

All the Codes contain similar provisions, and in considering them, or any part of them, the rule of construction prescribed by these sections must be applied.

Now, there is nothing in section 2253, *supra*, nor elsewhere in Title VIII, which even by inference lends support to the notion that the legislature intended it to apply to any money or other property reduced to possession by the state in escheat proceedings prior to its enactment. Indeed, the terms employed indicate the contrary. It is only after judgment had under the direction of this Title declaring the property escheated, that the

district court of Lewis and Clark county may entertain an application. Before such judgment has been had, no order is necessary. The judgment of the district court of Missoula county rendered in 1889 cannot be said to have been rendered under this Title.

Again, as there was no provision, prior to the enactment of the Code of 1895, by which the fund could be withdrawn from the state treasury, to give a retroactive effect to this Title would require the further conclusion that the legislature intended by the enactment of it to create causes of action in favor of a certain class of citizens out of what prior to the date of its enactment were not such; in other words, that it was intended to permit this class of citizens to sue and recover from the state property which rightfully belongs to it. Upon the assumption that the legislature has power to do this—and upon this point we express no opinion—the intention to do it must be clearly manifest. Such is not the case.

In the district court the sufficiency of the petition was challenged by demurrer for want of substance, and on the ground of want of jurisdiction. The demurrer should have been sustained. The order is therefore reversed, and the cause is remanded, with directions to dismiss it.

Reversed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

COOMBS ET AL., APPELLANTS, V. BARKER ET AL., RESPONDENTS.

(No. 2,104.)

(Submitted June 15, 1905. Decided July 24, 1905.)

Order Granting New Trial—Execution—Stay.

Orders—When Final—Appeal.

1. While an order upsetting a verdict vacates the judgment, still such an order is not final until after the time for appeal therefrom has passed, or until the appeal is determined.

Appeal from Order Granting New Trial—Execution—Stay.

2. Under Code of Civil Procedure, section 1733, providing that the filing of an appeal bond of \$300 stays all proceedings in the trial court "on the judgment or order appealed from," where both parties appealed from an order granting a new trial in part, a bond executed on the appeal did not stay the execution of the judgment.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by Frank Coombs and others against David L. S. Barker and others. From an order annulling an execution on a judgment in favor of plaintiffs, they appeal. Reversed.

Messrs. H. G. & S. H. McIntire, and Mr. Fletcher Maddox, for Respondents.

The original decree or judgment herein was entered July 18, 1903. *Inter alia* it included a money judgment against the moving defendants for \$64,411.32 and \$105 costs of suit. On the same day, July 18, 1903, an execution was sued out by plaintiffs and levied on the property in question. On October 26, 1903, the court granted defendants' motion for new trial so far as the said judgment for \$64,411.32 was concerned. But on the same day, on plaintiffs' motion, by a supplemental order, continued in force the *levy* which had been made under said execution "until the further order of the court." On October 30, 1903, plaintiffs perfected an appeal from said order granting defendants a new trial. On November 10, 1903, defendants perfected an appeal from so much of the order of October 26th as denied their motion for new trial and from the judgment of July 18th as modified October 26th, and gave the usual undertaking on appeal for \$300 and also for \$210, being double the amount named in the judgment as so modified.

The granting of the new trial had the effect to vacate the judgment of July 18, 1903, and to leave the case as though it had never been tried, so far as the money judgment therein is concerned. "Granting a new trial has the effect of vacating the judgment as well as the verdict; for the judgment rests upon the verdict and must fall with it." (Hayne on New Trial and

Appeal, sec. 167, p. 498; *Thompson v. Smith*, 28 Cal. 534; *Worden v. Murdock*, 23 Cal. 549, 83 Am. Dec. 135; *Martin v. Malfield*, 49 Cal. 45.) "And therefore an appeal cannot be taken from the judgment after a motion for new trial has been granted." (Hayne on New Trial and Appeal, sec. 167; *Kower v. Gluck*, 36 Cal. 407. See, also, *Knowles v. Thompson*, 133 Cal. 245, 65 Pac. 468; 14 Ency. of Pl. & Pr., p. 935, and cases in note 8; *Kower v. Gluck*, 33 Cal. 407; *Wheeler v. Kassabaum*, 76 Cal. 90, 18 Pac. 120; *Thompson v. Smith*, 28 Cal. 524, 528; *Estate of Crozier*, 65 Cal. 333, 4 Pac. 109.) "When a judgment is properly set aside the execution thereon issued falls with it, without a motion to quash." (*Ballard v. Whitlock* (Va. 1868), 18 Gratt. 235; 21 American Century Digest, col. 305, sec. 30 (h).)

The case presented is, by analogy, the same as when a receiver has been appointed. The taking possession by such receiver is an equitable levy; the property is thereafter *in custodia legis*. So with an execution levy the property levied upon is also *in custodia legis*. In the case of property so taken possession of by a receiver the rule is universal that upon perfecting an appeal drawing in question the validity of the receiver's appointment, the receiver must restore to the defendant possession of all property received by him as receiver. (See *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 136-140; *People's Cemetery Co. v. Oakland Cemetery Co.*, 24 Tex. Civ. App. 668, 60 S. W. 679; *State v. Hirzel, Judge*, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961; *Farmers' Nat. Bank v. Backus*, 63 Minn. 115, 65 N. W. 255; *Buckley v. George*, 71 Miss. 580, 15 South. 46; *Insurance Co. v. Hotel Co.*, 37 Wis. 125.) There is no authority under the law to retain the possession of the property levied on by giving the undertaking, had in this case. Such undertaking is not pursuant to any statutory authority, and is no defense to defendants' demand for a restoration of their property.

Where the court has improperly made an order directing an execution to issue, or, in this case, to keep the execution levy

in force, it may on motion recall the execution, or rescind the order referred to, even though the order itself might be appealable, as one made after final judgment. (*Buell v. Buell*, 92 Cal. 393, 28 Pac. 443, which reaffirms the same principle announced in *Dorland v. Hanson*, 81 Cal. 202, 15 Am. St. Rep. 44, 22 Pac. 552.)

We must conclude, then, that the supplemental order of October 26, 1903, continuing in force the levy, was and is in excess of the court's jurisdiction, and should be annulled.

Messrs. A. C. Gormley, and Walsh & Newman, for Appellants.

If this case is not one within the provisions named in section 1730 of the Code of Civil Procedure, the giving of the cost bond had the effect of staying all proceedings. Section 1733 of our Code is the same as section 949 of the California Code. That section has been construed in several cases in the supreme court of that state, and it invariably held that giving the cost bond stays all proceedings. (*Painter v. Painter*, 98 Cal. 625, 33 Pac. 483; *Born v. Horstman*, 80 Cal. 452, 22 Pac. 169; *Kreling v. Kreling*, 116 Cal. 458, 48 Pac. 383; *Johnson v. Power*, 93 Cal. 266, 28 Pac. 1070; *McCallion v. Hibernia Soc.*, 98 Cal. 442, 33 Pac. 329; *Anderson v. Anderson*, 123 Cal. 445, 56 Pac. 61; *Pennie v. Superior Court*, 89 Cal. 31, 26 Pac. 617; *Snow v. Holmes*, 64 Cal. 232, 30 Pac. 806; *Estate of Schedel*, 69 Cal. 241, 10 Pac. 334.) Hence, the proceedings are fully and effectually stayed, and the execution left in full force. The rights of the parties were preserved, and remain in the same condition as they were at the time the motion for a new trial was granted, and the appeals taken therefrom. (*Pierce v. Birkholm*, 110 Cal. 671, 43 Pac. 205; *Henry v. McGuire*, 111 Cal. 2, 43 Pac. 387; *Mountain etc. Co. v. Bryan*, 111 Cal. 38, 43 Pac. 410; *Storke v. Storke*, 116 Cal. 55, 47 Pac. 869, 48 Pac. 121; *Etchas v. Orena*, 121 Cal. 272, 53 Pac. 798.)

The court did not have jurisdiction or authority to release the levy. (*Ex parte Oxford*, 102 Cal. 656, 36 Pac. 928; *Ruggles v. Superior Court*, 103 Cal. 125, 37 Pac. 211; *Stewart v. Taylor*, 68 Cal. 5, 8 Pac. 605; *Pennie v. Superior Court*, 89 Cal. 31, 26 Pac. 617; *Peycke v. Keefe*, 114 Cal. 212, 46 Pac. 78; *Owen v. Pomona etc. Co.*, 124 Cal. 331, 57 Pac. 71; *Ford v. Thompson*, 19 Cal. 119; *Whitbeck v. Montana Cent. Ry. Co.*, 21 Mont. 102, 52 Pac. 1098. See cases collated in 2 Century Digest, 2559.) The plaintiffs acquired a lien on the property by their levy. The property was in the hands of the sheriff, and held by him as security. If the order granting a new trial should be reversed, the sheriff may then proceed to sell the property, under writ of *venditioni exponas* or an alias writ. (Freeman on Executions, secs. 32, 206, 271.) A stay of execution made by the court does not affect the lien of the levy. (Freeman on Executions, sec. 206; *Bain v. Lyle*, 68 Pa. St. 60; *Bond v. Willett*, 31 N. Y. 102; *Batdorf v. Focht*, 44 Pa. St. 195; *Dryer v. Graham*, 58 Ala. 623; *Griffin v. Wallace*, 66 Ind. 410; *Keel v. Larken*, 72 Ala. 493; *Duer v. Morrell*, 20 Ill. App. 355.)

MR. JUSTICE MILBURN delivered the opinion of the court.

This is an appeal from an order made after final judgment. Under an execution the sheriff levied upon certain shares of stock and certain money belonging to some of the defendants. The court granted a motion for a new trial in part. Plaintiffs and defendants appealed from this order. Plaintiffs also appealed from an order denying their motion for a new trial as to two defendants, Lavina A. Collins and E. J. Barker, and from a judgment in their favor. Thereafter the court, on motion based upon the files and records, made its order annulling the execution, and it is from this order that this appeal is before us.

The court seems to have entertained the idea, suggested by counsel here and in the court below, that there was not any

judgment against the defendants, because the court had granted a motion for a new trial. Several early California authorities are cited, which bluntly, without argument, say that the granting of a motion for a new trial vacates the judgment. Of course, a final order upsetting the verdict vacates the judgment. But such an order is not final until after the time for appeal therefrom has passed, or until the appeal is determined if there be one.

The appellants were not affirmatively commanded to do anything by the order granting the new trial. Therefore their appeal falls within those referred to in section 1733 of the Code of Civil Procedure, which declares that the filing of the appeal bond of \$300 stays all proceedings in the court below upon the judgment or order appealed from. The law is full of difficulty when we think of the numerous appeals allowed in the same cause, but the proceedings are stayed or not stayed under the judgment when an appeal such as the one before us is perfected. If the perfecting of the appeal stays only proceedings relating to "the *order* appealed from" (section 1733), then the sheriff may go ahead with the execution, and the court may not interfere. If, on the other hand, the proceedings under the judgment are stayed, then the sheriff stops, stays his hand, and waits, and the court may not annul the execution and order him to proceed to gather up the property and give it over to the judgment debtor.

The court was in error in making the order and setting aside the execution, and therefore said order is reversed and set aside.

Reversed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

33	80
38	508

DOLL, RESPONDENT, v. HENNESSY MERCANTILE COMPANY, APPELLANT.

(No. 2,128.)

(Submitted June 19, 1905. Decided July 24, 1905.)

Partnership—Actions in Firm Name—Rights of Partners—Sale of Entire Stock by One Partner—Conversion—Rights of Nonassenting Partner—Damages—Market Value—Evidence—Instructions.

Partnership—Actions in Firm Name.

1. An action may not be brought in a copartnership or firm name, section 590 of the Code of Civil Procedure, which provides that where persons, associated in business, transact such business under a common name, they may be sued by such common name, having no application to parties plaintiff.

Same—Rights of Partners—Actions Against Copartners.

2. Since the amount of the firm assets to which a partner is entitled depends on a settlement of the partnership affairs and an adjustment of balances, which can only be determined by a voluntary accounting or by a suit in equity, neither an individual partner, nor a purchaser of his interest, can sue at law to recover such share.

Same—Sale of Entire Stock by One Partner—Validity—Nonassenting Partner.

3. Under Civil Code, section 3232, subsection 3, a sale of the entire stock in trade of a partnership to a stranger is absolutely void as to the nonassenting partner's interest in the property sold, and both the purchaser and seller may be held liable by the complaining partner for a wrongful conversion of such interest.

Same—Action Against Purchaser—Parties.

4. Where one partner sold the entire stock in trade of a partnership to a stranger without the consent of his copartner, in violation of Civil Code, section 3232, subsection 3, it was not necessary that the nonassenting member of the firm make the wrongdoing partner a party plaintiff in an action against the purchaser for the value of the complaining partner's interest in the property sold.

Same—Conversion—Measure of Damages—Evidence.

5. The measure of damages applicable in an action brought by a partner to recover the value of his interest in the partnership property sold to a stranger by his copartner in violation of Civil Code, section 3232, subsection 3, is that fixed by Civil Code, section 4333, as the reasonable value of the property at the date of the conversion, or the highest market value at any time between the conversion and the verdict; and evidence, offered to show the accounts between the partners and that the firm was in debt, was neither relevant nor material as tending to establish the value of the property sold.

Same—Proceeds of Sale Applied to Debts of Firm—Invalidity of Sale as Against Nonassenting Partner.

6. Under Civil Code, section 3232, subsection 3, declaring that a partner is without authority to dispose of the whole of the partnership property at once, the invalidity, as against a nonassenting partner, of an attempted sale by one partner of the entire partnership property, is not affected by the fact that the amount received in the purchase was actually expended in liquidating the firm debts, and evidence to that effect was properly excluded in an action by a nonassenting partner.

Same—Ratification by Nonassenting Partner—Knowledge of Circumstances.

7. The ratification by a nonassenting partner of a sale by another partner of the entire partnership property, in violation of Civil Code, section 3232, subsection 3, which action was entirely beyond the scope of his authority, could only be accomplished by his accepting the benefits of such a sale with full knowledge of all the circumstances surrounding it.

Same—Partnership Agreement—Contents—Oral Evidence.

8. Where, in an action brought by a member of a partnership to recover the value of his interest in the partnership property, sold to a stranger by his copartner in violation of Civil Code, section 3232, subsection 3, some of plaintiff's witnesses were questioned about the partnership agreement, but made no statements as to the contents of the writing, an offer to prove by oral testimony that the wrongdoing partner had authority under its terms to make the sale, was properly rejected, it not having been shown that the writing was lost or destroyed.

Same—Market Value of Goods Sold—Evidence.

9. The defendant in an action, brought by a nonassenting partner to the sale of the entire stock in trade of a partnership by his copartner in violation of Civil Code, section 3232, subsection 3, may show why a price greater than the market price was paid, and that other considerations than the market value entered into the determination of the price paid for the stock.

Same—Good Faith of Purchaser.

10. Under Civil Code, section 3232, subsection 3, declaring that a partner has no authority to dispose of the whole of the partnership property at once, the purchaser acquires no title as against a nonassenting partner, regardless of the good faith of the purchaser or his want of knowledge of the complaining partner's interest in the property sold, or of the copartner's wrongdoing.

Same—Value of Property—Instructions—Jury—Weight of Evidence.

11. An instruction, in an action by one partner in a partnership against the purchaser of its entire stock in trade, which had been sold by his copartner in violation of Civil Code, section 3232, subsection 3, that the amount paid for property converted is not controlling as to value, unless it appears from the evidence that the same is the reasonable value, but the recovery should be based on the reasonable value of the property, if it exceeds the amount paid, or, if not, then upon the amount paid, was inconsistent with itself, contradictory in statement, and invaded the province of the jury by stating the weight they should attach to a particular portion of the evidence.

Insufficiency of Evidence—Appeal—New Trial.

12. The supreme court will not ordinarily determine whether the evidence is insufficient to sustain the verdict, when a new trial is ordered for errors committed during the trial.

Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

ACTION by George E. Doll against the Hennessy Mercantile Company. From a judgment for plaintiff and from an order denying it a new trial, defendant appeals. Reversed.

Mr. John J. McHatton, Mr. John G. Brown, and Mr. T. J. Walker, for Respondent.

It is useless to discuss what the authority of one partner is or may have been at common law. The statute, if it means anything, is the absolute rule of law with reference to the matter. It supplants, according to the provision of the Code itself, the common-law doctrine. It renders one copartner as absolutely powerless to sell all, or that portion of the partners' property which will render it impossible for the partnership to continue in business, as a third person or a stranger. Whether he act for himself or assume to act for the partnership, his act of claimed conveyance or sale does not, and cannot in the face of the statute, convey any title to the party who receives the property.

The alleged sale was unwarranted, and under none of the authorities before the statute could the appellant claim to have succeeded to anything except the interest of Fleming, but, under our statute, it could not succeed as to that. It is in no position to say that it acquired any right whatever. It is in no position to say that this action should be maintained for an accounting, and that Fleming should be a party hereto, for, although it says so, had the action been brought in such a way it would have had the undoubted right to defeat it. This was recognized by this court in *Waite v. Vinson*, 14 Mont. 405, 415, 36 Pac. 828.

It cannot be that the appellant can complain that the action should be to set aside the sale. The principle of *caveat emptor*

applies. If I bring an action to set aside a sale made by a party not authorized by me to make it, and whom the law prohibits from making it, I am not to be estopped because I do not offer to return the money paid. The appellant in this case acted with knowledge and acted at its peril.

The fact that this action is against a third party, and is not an action for accounting between the members of the partnership, shows that that was neither necessary nor proper. The fact that the plaintiff is only suing for one-half of the value of the property, to which he is admittedly, by the testimony, entitled, renders it unnecessary to discuss the question of bringing the action in the name of the firm, or joining Fleming as a party plaintiff. In support of the correctness of our position we call attention to the statute and to *Steinhart v. Fyrhie*, 5 Mont. 463, 473, 6 Pac. 367; *Carrie v. Cloverdale etc. Co.*, 90 Cal. 84, 27 Pac. 58, and *Coleman v. Darling*, 66 Wis. 155, 57 Am. Rep. 253, 28 N. W. 367.

Mr. James E. Healy, and Mr. M. J. Cavanaugh, for Appellant.

This interest which the appellant purchased was not a determined interest, not a divided interest, nor an undivided interest, but it was a determinable interest, to be determined only by an accounting and settlement of the partnership business and affairs. In order to determine the share of Fleming or Doll, and consequently the share of the appellant and respondent in this property, it became necessary to determine the original contribution of each partner, and the fact whether there was a profit or loss, and if so, how much. And in order to do this, it was necessary to form a complaint upon this theory, and to make the other partner a party plaintiff, if willing to be joined as such; if not, he should be made a defendant with appellant. (*Cuyamaca Granite Co. v. Pacific Paving Co.*, 95 Cal. 252, 30 Pac. 525.)

One partner cannot maintain an action against a third person. (*Sindelare v. Walker*, 137 Ill. 43, 31 Am. St. Rep. 353,

27 N. E. 59.) One partner cannot sue for his own share. (*Biglow v. Reynolds*, 68 Mich. 344, 36 N. W. 95. See *Williams v. Lewis*, 115 Ind. 45, 7 Am. St. Rep. 403, 17 N. E. 262.) One partner cannot maintain suit in replevin or trover against a partner; no more can one maintain such an action against a partner's assignee or transferee. (Pomeroy on Remedies and Remedial Rights, 2d ed., pp. 266-268, 270.) A single partner cannot demand a part of the assets. (George on Partnership, pp. 152, 301; Parsons on Contracts, 4th ed., p. 260, sec. 249.) A partner's right to partnership property is an ownership of all the assets of the firm, subject to the ownership of every other partner, all of the partners holding all of the property subject to the partnership debts. (Parsons on Partnership, 350.) It is clear, therefore, that the individual interest of one partner can only be ascertained by a settlement of the partnership. (*Bopp v. Fox*, 63 Ill. 540; *Chandler v. Lincoln*, 52 Ill. 74; *Menagh v. Whitehall*, 52 N. Y. 146, 11 Am. Rep. 683.) Until plaintiffs' actual interest had been determined, there can be no ascertainment of his damage. (*Buckmaster v. Gowen*, 81 Ill. 153; *Sweet v. Morrison*, 103 N. Y. 235, 8 N. E. 396.)

Where one partner transfers property of the firm, thereby defrauding his copartner, the defrauded partner cannot maintain an action at law to recover either the property or its value. (*Miller v. Price*, 20 Wis. 117; *Craig v. Hulschizer*, 34 N. J. L. 363; *Fenton v. Block*, 10 Mo. App. 536; *Reed v. Gould*, 105 Mich. 368, 55 Am. St. Rep. 353, 63 N. W. 415; *Halstead v. Shepard*, 23 Ala. 558; George on Partnership, 391; *Homer v. Wood*, 11 Cush. 62; *Farley v. Lovell*, 103 Mass. 387; *Weaver v. Rodgers*, 44 N. H. 112; *Grover v. Smith*, [approving *Homer v. Wood*], 165 Mass. 132, 52 Am. St. Rep. 506, 42 N. E. 555.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action in conversion by one of two copartners against a third person to whom the other copartner sold the copartnership property. The copartnership consisted first of four members,

and then of two—the plaintiff and one Fleming—and was engaged in conducting a retail ice business in the city of Butte under the firm name of Consumers' Pure Ice Company.

The complaint alleges, in substance, that on May 14, 1900, the firm was the owner and possessed of sixteen hundred tons of ice, of the value of \$3,200, the same being its entire stock in trade, upon which it carried on its business, and from which it supplied its patrons; that on or about the date aforesaid Fleming entered into a conspiracy with one Prebbles to get possession of, sell, and dispose of the firm's stock in trade, for the purpose of defrauding the plaintiff of his interest therein; that Fleming pretended to sell the same to Prebbles, but that the sale was without the plaintiff's consent and against his wishes; that Prebbles well knew that the plaintiff was the owner of a one-half interest therein, and also that it was the entire stock of the firm; that in pursuance of said fraudulent purpose, and in consummation of it, the said Prebbles sold and transferred the whole of the stock to the defendant corporation, which took possession of it and converted it to its own use with full knowledge of plaintiff's interest in it, and of the means by which Prebbles acquired his possession; that plaintiff, by reason of the premises, has been damaged in the sum of \$1,600; and that, prior to the commencement of this action, plaintiff demanded of defendant payment of said amount, which was refused. Judgment is demanded for the value of plaintiff's interest.

The answer denies all the material allegations of the complaint, and alleges various matters affirmatively as defenses: That plaintiff was a traveling salesman, engaged in the pursuit of his business, and had entirely abandoned the copartnership business to Fleming; that at the time of the sale plaintiff had in the city of Butte a general agent (one Fitzgerald), who before the sale to Prebbles was consummated, notified the plaintiff that the same was about to be made, and that the plaintiff consented to it; that after the sale was made to defendant by Prebbles the plaintiff received a portion of the purchase price from Fleming as full compensation for his interest; that the

firm, notwithstanding the sale, still retained a large amount of other property, a part of its stock in trade; that the sale was made in order to meet outstanding obligations of the firm, but that nevertheless the business of the firm could have been continued as profitably as theretofore; and that the moneys derived from the sale were used to pay the debts of the firm. It is denied, also, that the interest of the plaintiff was at any time greater than a one-fourth. The replication joins issue upon all these allegations.

The plaintiff had a verdict and judgment in accordance with the prayer of his complaint. The defendant has appealed from the judgment and an order denying it a new trial.

1. The first point made by appellant is that the complaint is bad, in that it does not state sufficient facts, and in that there is a defect of parties plaintiff. It is conceded that, if it appeared that the plaintiff was the sole owner of the property, at the time of the conversion, the facts alleged would entitle him to recover; but it is said that, as it appears that he and Fleming were partners, the action should have been brought in the name of the firm or of all the partners, since one copartner may not sue in his own name for a conversion of the property of the firm by a stranger. It is also said that it does not appear that there had been an accounting between the parties and an ascertainment of the amount due the plaintiff, and that for this reason he cannot maintain the action. It may be remarked in passing that there is no statute authorizing an action to be brought in a copartnership or firm name. Section 590 of the Code of Civil Procedure has no application to parties plaintiff. (*Gilman v. Cosgrove*, 22 Cal. 357.)

One partner cannot sue his copartner at law to recover his share of the firm assets. The amount to which he is entitled always depends upon a settlement of the partnership affairs, and an adjustment of the balances between the partners. (*McMahon v. Thornton et al.*, 4 Mont. 46, 1 Pac. 724.) If upon dissolution the accounting and settlement is not made voluntarily, it may be enforced by suit in equity, but not by an ac-

tion at law, for the procedure at law is not adapted to an adjustment of the equities between the parties, and an ascertainment of balances depending generally upon a statement of extended and complicated accounts. Nor, for the same reason, may the purchaser of the interest of one of two or more copartners sue at law for his share. Nor, at the common law, could one partner maintain an action against a stranger for a conversion of the firm assets. The unity of ownership required all the partners to join in the action. (Pomeroy on Rights and Remedies, sec. 223.) But it is not useful to discuss the common-law rule.

The action was brought in pursuance of the provisions of section 3232 of the Civil Code, which declares: "A partner, as such, has no authority to do any of the following acts, unless his copartners have wholly abandoned the business to him, or are incapable of acting: * * * (3) To dispose of the whole of the partnership property at once. * * * " The theory adopted by the plaintiff is that the sale of the entire stock in trade by Fleming was wholly void, that defendant obtained no title to plaintiff's interest by his purchase from Prebbles, and that the result was a wrongful conversion of it, for which defendant may be held liable by him to the extent of his interest. We think this theory correct. The statute is meaningless unless it be so construed as to permit all the legitimate consequences to flow from the unauthorized sale.

The lack of authority in Fleming rendered the sale void as to plaintiff. Prebbles obtained no title to plaintiff's interest, and could not clothe the defendant with any better right than he himself had. Therefore both Prebbles and defendant became liable. It must follow, also, that the plaintiff is entitled to maintain the action without joining Fleming as coplaintiff. The wrongdoing copartner could not be heard to say that the sale was void as to him. This would be to permit him to allege and prove his own wrong as the ground of recovery. The sale, moreover, was valid as to his interest.

If plaintiff may not maintain the action, then there is no

means by which he may have a remedy for the wrong done him by his partner's violation of the statute. The wrong was done him by an invasion of his individual rights, not those of the firm or of the partners generally. The purpose of the action is to redress this wrong, and not to enforce the equities between the partners and to adjust their balances. Defendant cannot insist that the plaintiff shall pursue this course. It did not buy Fleming's interest in the partnership, as such. It purchased the property, and did not undertake to assume its possession subject to plaintiff's equities. It also thus became a wrongdoer, and cannot be heard to say that there must be a partnership accounting, and that plaintiff must be satisfied with the result of such an accounting. If it had bought Fleming's interest only in the partnership, its objection to the complaint would have been proper. As it is, and in so far as criticism is made of it, the pleading is sufficient to sustain the action, and is not open to the objection that there is a defect of parties plaintiff. The objections were made by general and special demurrer. The action of the court in overruling it was correct, as was also its action in overruling objections to the introduction of evidence on the ground that it is not alleged that there had been a settlement of accounts, and a balance ascertained. The rule insisted on by defendant is applicable only to cases where there has been a sale or assignment by one partner of his interest in the partnership business. The purchaser then becomes entitled to the surplus after a full accounting has been had. (*McMahon v. Thornton et al.*, *supra*; *Menagh v. Whitwell*, 52 N. Y. 146, 11 Am. Rep. 683; *Sindelare v. Walker*, 137 Ill. 43, 31 Am. St. Rep. 353, 27 N. E. 59; *Walsh v. Adams*, 3 Denio, 125; *Parsons on Partnership*, 4th ed., 225 et seq.)

The statute, however, neither requires nor permits the application of this principle in an action of this character; and the measure of recovery is the market value of plaintiff's interest in the property, without reference to an accounting, or to the condition of the firm as to solvency. It was so held in *Walsh v. Adams*, *supra*, where a sheriff seized the goods of

a partnership in order to satisfy an execution against one of the partners and sold the entire stock, instead of the interest of the defendants in the execution. We can see no reason why the same rule should not apply under the statute. This view has been adopted by the supreme court of California under a statute identical in every particular with section 3232, *supra*, except that it does not apply to property consisting entirely of merchandise (*Carrie v. Cloverdale B. & C. Co.*, 90 Cal. 84, 27 Pac. 58), and with this view we agree. The case of *Waite v. Vinson et al.*, 14 Mont. 405, 36 Pac. 828, cited by counsel for defendant, is not in point, as we shall see later.

2. The foregoing remarks dispose of the contention of the defendant that the court erred in excluding all evidence tending to show that the firm was in debt, and the condition of the accounts between the partners. The purpose of the offer of this evidence was to show the value of the interest of plaintiff in the partnership; in other words, to show the amount of the detriment suffered by plaintiff. The measure of damages applicable is fixed by section 4333 of the Civil Code, as the reasonable value of the property at the date of the conversion, with interest from that time, or, in a proper case, the highest market value at any time between the conversion and the verdict, without interest, together, in each case, with fair compensation for the time and money properly expended in pursuit of the property. The evidence was neither relevant nor material as tending to establish the value of the property sold by Fleming, and subsequently delivered to the defendant.

Evidence was also offered tending to show that the amount received by Fleming from Prebbles was actually expended in liquidating the debts of the firm. The exclusion of this evidence is assigned as error. There is no merit in the assignment. *Waite v. Vinson*, *supra*, was an action for a partnership accounting, and to rescind a sale by one of the partners of a large portion of the partnership property for the purpose of liquidating the firm debts. It was there said: "If the price paid was the fair value of the property, and the purchase money

had been used to pay firm obligations, for which the complaining member was liable, or in part for that purpose, and in part had been retained by a partner found on an accounting entitled thereto, there would hardly be any material injury to the complaining member through the sale. It certainly would not be equitable to hold that the purchase price might be retained, and go to the liquidation of firm debts for which the complaining partner was liable, and at the same time set aside the sale, and deprive the purchaser of the property bought, without any restoration of the purchase money, as was done in this case." This passage is quoted by counsel for appellant as conclusive of its contention. The equitable principle stated has no application. This is not an action for an accounting between partners, nor to rescind the sale by which the defendant became possessed of the property. The defendant stands in no such relation to the firm as that it may demand a settlement of its affairs. If the rule should be held applicable, the result would follow that, though Fleming could not make a sale of the property so as to give defendant title as against the plaintiff, yet, by applying the proceeds of the sale to the discharge of the debts of the firm—his own as well as plaintiff's—and without the plaintiff's knowledge and consent, he would deprive the plaintiff of his right of action entirely, and that without reference to whether the sale was made to secure funds for that purpose or not.

While there is much plausibility in the argument that since the plaintiff has received benefit from the payment of his debts, which he was bound, in any event, to pay, he should not be heard to complain, yet to allow it way would defeat the purpose of the statute. There was evidence tending to show that the plaintiff some time after the sale received from Fleming \$300, and that he accepted it with full knowledge of the sale, and that the amount was probably a part of the proceeds of it. This was properly admitted as tending to show ratification by plaintiff of Fleming's act. If the offer of the evidence in question had been broad enough to include knowledge and consent

on the part of the plaintiff to the appropriation of the funds to a discharge of the debts, if any, the evidence might have been admissible as a circumstance tending to show ratification, as might also evidence of the existence of such debts, which we have held properly excluded upon the theory upon which it was offered. Fleming's action being entirely beyond the scope of his authority, ratification by the plaintiff could be accomplished only by his accepting the benefits of it with full knowledge of all the circumstances. Upon the offer as made, the ruling was correct.

The defendant also offered to prove by the oral testimony of one of its witnesses the contents of the partnership agreement, the purpose being to show that, under its terms, Fleming had authority to make the sale. It had not been shown that the writing was lost or destroyed. This offer was rejected. This ruling is assigned as error. It is said that the court had permitted the plaintiff to prove its contents in part by oral testimony, over objection of defendant, though proper foundation had not been laid by a showing that the writing had been lost or destroyed, and that, since the plaintiff had been permitted to do this, it was error not to permit the defendant to prove other parts of it by the same means. The record does not sustain the defendant's position. While some of the plaintiff's witnesses were questioned about the agreement, no one of them undertook to state any of its contents. Of this ruling the defendant has no cause to complain.

One Dunn, an employee of the defendant, who negotiated the purchase from Prebbles, being called as a witness by plaintiff, stated that the price paid for the ice by defendant was \$3,200. On cross-examination he was asked by counsel for defendant if this price was fixed by the market value, the evident purpose being, as appears from other parts of his testimony, to show that the defendant paid Prebbles more than the market value of it in order to induce him to pay a considerable debt due from him to defendant, which it had theretofore regarded as not collectible. The court did not permit the witness to answer.

This was error. While it was competent to prove the price paid, as a fact tending to show the market value, the defendant was not concluded by it. The witness should have been permitted to explain, if he could, and if such was the fact, why a price greater than the market price was paid, and his explanation should have gone to the jury together with all the other evidence as to value.

Many other errors are assigned upon rulings of the court admitting and excluding evidence. The questions involved are in all respects similar to those presented by assignments already noticed. What is said with reference to them will be sufficient guide to the court upon another trial.

3. Criticism is made of the instructions that the court nowhere in them told the jury that if they found from the evidence that the defendant purchased the ice from Prebbles in good faith, and without knowledge of any defect in his title, they should render a verdict in defendant's favor. This criticism proceeds upon the assumption that there was evidence tending to show that when the purchase was made the defendant had no knowledge of plaintiff's interest or of Fleming's wrongdoing, and that, if the jury found that such was the fact, the defendant was entitled to a verdict. The assumption is erroneous. The evidence, beyond question, shows that the agent of the defendant at the time of the purchase was fully aware of the fact that he was purchasing partnership property, and of the extent of plaintiff's interest therein, or at least that plaintiff had an interest therein as a member of the firm. But even if there had been evidence of defendant's want of knowledge and its good faith, it would not have justified the court in submitting to the jury such instructions as defendant desired. The inquiry as to good faith was wholly immaterial. Prebbles did not obtain title to plaintiff's interest, for the reason that Fleming had no authority to sell. A purchaser from him could get nothing more than he himself had. Therefore, the defendant stands upon no higher ground. Both Prebbles and defendant, in appropriating the property, violated plaintiff's rights, and

were equally guilty of a conversion of his interest in the property sold. Speaking generally, the instructions submitted were formulated upon this theory, and fairly covered the issues involved. One of them seems to imply that the court was of the opinion that defendant's good faith was a defense, but of this apparent inconsistency the defendant does not complain. We think the court's theory correct, and that the defendant's criticism is without merit.

Paragraph 9 of the instructions is in part as follows: "The amount paid by the Hennessy Mercantile Company for the ice is not controlling as to value, unless it appears from the evidence that the same was the reasonable value; but if the plaintiff is entitled to recover, he is entitled to recover his proportion, based upon the reasonable value of the ice, if it exceeds the amount paid by the Hennessy Mercantile Company, or, if not, then upon the amount paid by the Hennessy Mercantile Company for the ice." In the first part of this instruction the jury were told, and properly so, that they were not to be controlled in fixing the value by the price paid by defendant. Later they were told, in substance, that they might consider the evidence so far as it tended to show a greater value than the price paid; but if, upon the evidence, they could not find that the reasonable value was greater than the price paid, they were bound by the price paid, and must find accordingly, thus excluding from their consideration all evidence tending to show a smaller value. It distinctly invades the province of the jury by stating the weight they should attach to a particular portion of the evidence. It is inconsistent with itself and contradictory in statement—so much so that it is almost impossible to get from it a clear idea of what the court had in mind—and doubtless the jury were led by it to find as they did, that the ice was worth the price paid for it by defendant.

4. Contention is made that the evidence is wholly insufficient to sustain the verdict. We shall not undertake to analyze it and determine whether the contention is well founded, for the reason that there must be a new trial.

The judgment and order are reversed, and the cause is remanded, with direction to grant a new trial.

Reversed and remanded.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

**CAPITAL LUMBER COMPANY, RESPONDENT, v. BARTH
ET AL., APPELLANTS.**

(No. 2,152.)

(Submitted June 24, 1905. Decided July 29, 1905.)

Action for Debt—New Trial—Joint Motion—General Verdicts—Disregard of Findings—Waiver—Estoppel—Pleadings—Evidence—Instructions.

New Trial—Joint Motion—Insufficiency of Evidence—Assignment of Error as to One Defendant.

1. In an action against joint defendants for goods sold and delivered, where the issue of fact was whether the person who purchased the goods was authorized to do so as agent for defendants, an assignment of error that the evidence was insufficient to sustain the verdict as to one defendant did not call for a new trial as to both defendants, and a joint motion for a new trial, so far as based on such assignment, was properly overruled.

Trial—General Verdicts—Disregard of Findings—Appeal.

2. Where the district court, in an action for debt, entered judgment upon a general verdict, and in doing so, ignored certain special findings which were contradictory and inconsistent, the appellants, for failure to object to the court's action or to move for judgment upon the findings, are precluded from complaining of the inconsistencies in the findings for the first time on appeal.

Instructions—Estoppel—May be Proved Without Pleading—When.

3. While the general rule with respect to estoppel is that, in order to be effective, it must be pleaded, yet, where there has been no opportunity to allege it, it may be given in evidence with the same conclusive effect as if alleged, and an instruction to the effect that, in order to invoke the doctrine of estoppel, in an action for debt where the agency of the person who bought the goods was in question, it is necessary to plead it, was properly refused, it not appearing that plaintiff knew that he would have to rely upon an estoppel.

Evidence—Estoppel—Admission without Objection—Submission to Jury.

4. *Held*, that where evidence of an estoppel, not pleaded, is admitted without objection, it may properly be submitted as if warranted by the pleadings.

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Instructions—When Refusal not Error.

5. Where the instructions given fairly cover the issues involved, refusal to submit other instructions is not reversible error.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by the Capital Lumber Company against John C. Barth and Louisa Schwegler. From a judgment for plaintiff and from an order denying a new trial, defendants appeal. Affirmed.

Mr. H. S. Hepner, for Appellants.

If the defendant Schwegler is entitled to a new trial, can the court grant the motion as to her and refuse it as to the defendant Barth? We submit that it cannot. In the absence of a statute authorizing a court to vacate a judgment as to one of the defendants in this case the power does not exist, as the judgment must be treated as an entirety. (*Boehmer v. Big Rock Irr. Dist.*, 117 Cal. 19, 48 Pac. 908; *Loomis v. Perkins*, 70 Conn. 444, 39 Atl. 797; *Tillett v. Lynchburg R. Co.*, 115 N. C. 662, 20 S. E. 480; *Sheldon v. Quinlen*, 5 Hill (N. Y.), 441; *Gargan v. School Dist. No. 15*, 4 Colo. 53; *Powers v. Irish*, 23 Mich. 429; *Kimball & Ward v. Tanner*, 63 Ill. 519; *Washington v. Johnson* (Tex. Civ. App.), 34 S. W. 1040.)

In *St. Louis R. Co. v. Bricker*, 61 Kan. 224, 59 Pac. 268, it is said: "A general verdict based upon findings which are inconsistent with each other and contradictory to matters material to the issue in the case, will be set aside." (See, also, *Dickerson v. Waldo*, 13 Okla. 189, 74 Pac. 505; *Carmen v. Ross*, 64 Cal. 249, 29 Pac. 510; *Learned v. Castle*, 78 Cal. 460, 18 Pac. 872, 21 Pac. 11; *Sloss v. Allmann*, 64 Cal. 47, 64 Pac. 574; *Reese v. Corcoran*, 52 Cal. 495.)

That it was error to refuse the instruction requested, see *Rail v. City Nat. Bank*, 3 Tex. Civ. App. 557, 22 S. W. 865; *Gooding v. Underwood*, 89 Mich. 187, 50 N. W. 818; *Homberger v. Alexander*, 11 Utah, 363, 40 Pac. 260.

Messrs. Word & Word, and Mr. C. W. Wiley, for Respondent.

The special findings are apparently contradictory and conflicting and irreconcilable, and hence in such case nullify and destroy each other, and the general verdict must stand. (*Drake v. Justice Co., supra; Indiana etc. Gas Co. v. McMath*, 26 Ind. App. 154, 57 N. E. 593, 59 N. E. 287; 20 Ency. of Pl. & Pr. 354, 364, cases cited; Elliott's General Practice, sec. 922.)

Plaintiff had no opportunity to plead the estoppel, but relied upon the agency and the complaint alleged the sale to defendants; the answer was a general denial and the lease and contract attempted to be relied upon by defendants as conclusive was not pleaded, and plaintiff given an opportunity to set up facts of an estoppel in a replication. As to rule applicable in such case, see 16 Cyc. 806-809, notes; 8 Ency. of Pl. & Pr. 7, note 1, pp. 8, 9; 2 Abbott's Brf. on Pl., 1444, 1447, notes; *Shelton v. Alcox*, 11 Conn. 240; *Woodhouse v. Williams*, 14 N. C. 508; *Isaacs v. Clark*, 12 Vt. 692, 36 Am. Dec. 372; *Flandreau v. Downey*, 23 Cal. 354; *Southern Pac. R. Co. v. United States*, 168 U. S. 1, 57-60, 18 Sup. Ct. 18, 42 L. Ed. 355.

"A party having ground for a new trial may lose the benefit of it by proceeding jointly with a party not so favorably situated, * * * and when there is any doubt as to the identity of relation or equality of right therein, separate notices should be given though they be represented by the same attorney." (1 Spelling on New Trial and Appellate Practice, sec. 372, p. 671; *Cloverdale v. Edwards*, 155 Ind. 374, 58 N. E. 495; *Whitely Mal. Co. v. Berrington*, 25 Ind. App. 391, 38 N. E. 268; *Wiggenhorn v. Kountz*, 23 Neb. 690, 8 Am. St. Rep. 150, 37 N. W. 603; *Scott v. Chope*, 33 Neb. 41, 49 N. W. 940; *Porter v. Sherman Banking Co.*, 40 Neb. 274, 58 N. W. 721; *Miller v. Adamson*, 45 Minn. 99, 47 N. W. 452; *Hogan v. Peterson*, 8 Wyo. 549, 59 Pac. 162; *Kentucky Co. v. Morgan*, 28 Ind. App. 89, 62 N. E. 68. See, also, *Albright v. McTighe*, 49 Fed. 817; *Clark v. Austin*, 38 Minn. 487, 38 N. W. 615; *Heffner v. Moyst*, 40 Ohio St. 112; *Hayden v. Woods*, 16 Neb. 306, 20 N. W. 345; *Bicknell v. Dorion*, 16 Pick. 478; *Wittenbrock v.*

Bellmer, 62 Cal. 558; *Bremen Bank v. Umrath*, 55 Mo. App. 43; *Holborn v. Naughton*, 60 Mo. App. 100; *City of Kansas City v. File*, 60 Kan. 157, 55 Pac. 877; *Ex parte Lowman & H. Co.*, 2 Wash. 427, 27 Pac. 232; *Maxwell v. Habel*, 92 Ill. App. 510; *Moreland v. Durocher*, 121 Mich. 398, 80 N. W. 284; *Sims v. State*, 87 Ga. 569, 13 S. E. 551; *Nashville v. Gore*, 106 Tenn. 390, 61 S. W. 777, and others.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Appeals from a judgment in favor of plaintiff and from an order denying defendants' motion for a new trial. The action was brought to recover the price of goods, wares, and merchandise alleged to have been sold to defendants by plaintiff, and also by another, whose claim plaintiff holds as assignee for value. The complaint is in the ordinary form for goods, wares, and merchandise sold and delivered. The defendants answered separately putting in issue all the material allegations of the complaint. Upon a trial to a jury the court submitted the case for certain special findings and a general verdict. The general verdict was in favor of plaintiff. The special findings are inconsistent with each other and also the verdict. The court, without objection on the part of defendants, or motion for judgment on the findings, entered judgment on the general verdict.

The errors assigned are that the evidence is insufficient to sustain the verdict as to defendant Schwegler, that the special findings are so contradictory and inconsistent that they do not support the judgment, and that the court erred in refusing certain instructions to the jury requested by defendants.

1. The motion for a new trial was joint. The contention is made that there is no evidence to support the verdict as against defendant Schwegler, and, since this is so, a new trial should be granted both defendants. This contention cannot be sustained. There is a conflict in the decisions upon the question

whether, when a joint motion is made, the trial court should grant a new trial as to the one or more movants who appear to be entitled thereto (Spelling on New Trial and Appellate Practice, sections 372, 395), some of the courts holding, as this author points out, that a party having a ground for a new trial loses the benefit of it by proceeding jointly with another who is not so favorably situated. We know of no authority to the effect that all the losing parties may insist upon a new trial because one has ground therefor, which does not in any way affect the merits of the judgment as to the others.

Cases may arise where the rights of the losing parties are so intimately connected that what has prejudiced one during the course of the trial may also have prejudiced the other, and the court would feel constrained to grant a new trial as to all in order to remedy the wrong against the one as to whom otherwise the judgment should be allowed to stand. Such were the cases of *Strand v. Griffith et al.* (C. C.), 109 Fed. 597, and *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543. In the first of these two cases there was no evidence to sustain the verdict as against one defendant. The court granted a new trial as to all, for the reason that it could not say that evidence admitted as to transactions between the plaintiff and the one defendant did not enhance the amount of the verdict as to the others. A like situation was presented in *Gaslight Co. v. Lansden*.

This action is for debt. The controversy in the evidence was as to whether one Greene, who purchased the goods, wares, and merchandise, was authorized to do so upon the credit of defendants as their agent. The jury found that he was. The evidence might be wholly insufficient to charge one of the defendants and not the other. But the evidence as to the one could not in any way affect the rights of the other, and the rule of the cases cited does not apply. Under these circumstances, since the assignment goes to the insufficiency of the evidence as to the defendant Schwegler alone, and a new trial is demanded as to both, and not as to Schwegler only, the dis-

strict court properly denied it so far as the motion was based on it.

2. It is said that, since the special findings are contradictory and inconsistent, they therefore do not sustain the judgment. The court ignored the findings, and rendered judgment upon the general verdict. No complaint is made that this is error. Such being the case, we do not think the contradictions or inconsistencies in the findings affect the validity of the judgment. If any error was committed, it was in the action of the court in entering judgment upon the verdict instead of upon the findings, which, taken as a whole, are inconsistent with the verdict, and entitled defendants to judgment had they moved the court for it. As they did not do so, and as they do not complain of the court's action in the premises, they do not stand in any attitude to complain of the inconsistencies in the findings.

3. It appears that one Greene secured from the defendant Barth a lease of property in the city of Helena known as the "Hotel Helena" for a term of two years beginning on May 1, 1902, at a monthly rental of \$500. This lease was assigned by Barth to the defendant Schwegler. The goods were purchased by Greene for use in running the hotel during October, November, and December, 1902. Soon after Greene took possession of the property, and in May, 1902, there was some controversy between him and Barth as to representations made by Barth to induce Greene to take the lease, the latter insisting that the representations were false, and that he should be released from the contract. The theory of the plaintiff was and is that Barth released Greene from his obligation under the lease, and undertook to conduct the hotel for himself and his codefendant, retaining Greene as manager; and that Greene being in fact their agent, and held out by them as such at the time the purchases were made, the defendants are liable.

Among other instructions requested by the defendants was the following, which was refused: "You are further instructed that under some circumstances a party may be estopped from

disputing the fact that another is his agent, although the relation of principal and agent does not in fact exist; but in order to invoke this doctrine of estoppel it is necessary that the pleadings should allege the facts relied upon to show the estoppel, and, as no estoppel is pleaded in this case, the plaintiff is not entitled to recover unless an agency in fact existed as between the said E. C. Greene and the defendants, or either of them." It is said that, since no estoppel is alleged in the complaint, and the evidence tends only to show an agency by a holding out by the defendants, the refusal to give this instruction was prejudicial error. The evidence was introduced without objection, and, conceding that it tends only to show a holding out, the instruction was properly refused.

It is the general rule that matter of estoppel, to be effective, must be alleged. Where, however, there has been no opportunity to allege it, it may be given in evidence with the same conclusive effect as if alleged. In *Isaacs v. Clark*, 12 Vt. 692, 36 Am. Dec. 372, it is said: "It is no doubt true that where the party has an opportunity to plead the estoppel he is bound to do it, and if he omits it, the jury will not be bound by the estoppel, but may find according to the fact. If, however, there has been no opportunity to plead the matter as an estoppel, it may, in general, be given in evidence, and it will have the same conclusive effect as in cases where it is pleaded. This is according to the current of the authorities, though they may not have been entirely uniform,"—citing cases.

It does not appear from the record that the plaintiff knew that he would be compelled to rely upon the matter of estoppel in order to recover against the defendants. The complaint alleges that the goods were sold and delivered to the defendants. This form of allegation is appropriate to charge defendants who have rendered themselves liable under an agent duly authorized or empowered to charge them. Since it does not appear that the plaintiff knew that he would have to rely upon the estoppel, the matter was properly proved, although not alleged.

Again, the evidence having been admitted without objection, plaintiff was entitled to have it submitted to the jury as if warranted by the pleadings. (*Fabian v. Collins*, 3 Mont. 215; *Alderson v. Marshall*, 7 Mont. 288, 16 Pac. 576; *Hanson v. Buckner's Exrs. etc.*, 4 Dana, 251, 29 Am. Dec. 401.)

Like complaint is made that the court erred in refusing to submit two other instructions. We think, however, that the instructions given fairly covered the issues involved, and that the defendants have no grounds for complaint. The judgment and order are affirmed.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

DALY BANK AND TRUST COMPANY OF BUTTE, Re-
SPONDENT, v. BOARD OF COUNTY COMMISSIONERS
OF SILVER BOW COUNTY ET AL., APPELLANTS.

33	101
34	399
34	400

(No. 2,144.)

(Submitted June 22, 1905. Decided July 29, 1905.)

*Taxation—Banks—Stock—Exemptions—Solvent Credits—Con-
stitution.*

Taxation—Trust Companies—Statutes—Constitutionality.

1. Civil Code, section 611, providing that the property of trust deposit and security corporations shall be assessed for purposes of taxation in the same manner as national banks, is, in view of the fact that section 5219 of the United States Revised Statutes limits the right of the state to tax such banks to the taxation of their real estate, and their stockholders, to the shares of capital stock owned by them, repugnant to Article XII, sections 1 and 7 of the Constitution of Montana, in that it exempts the personal property of such companies from taxation.

Taxation—State Banks and Trust Companies—Stock.

2. Since stocks of a state bank or trust company fall within the definition of *property* as given in section 17 of Article XII of the Constitution of this state and in subdivisions 1 and 4 of section 3680 of the Political Code, they must be assessed to the owners at their full cash value, except to the extent that that value is represented in property which is assessed to the bank or trust company.

Taxation—Banks and Trust Companies—Solvent Credits—Deduction of Just Debts.

3. For the purposes of taxation, a state bank or trust company may deduct from its solvent credits its just debts, provided it makes the proper return to the assessor, and claims the reduction, and otherwise complies with the law; and all its remaining property is subject to taxation, the same as the property of a natural person.

Taxation—Banks and Trust Companies—Statutory Construction—Constitution.

4. The purpose of section 3701, subsection 6, of the Political Code, which provides for the taxation of solvent credits, less such debts as may be owing by the taxpayer, being merely to ascertain the just amount and value of property subject to taxation, in conformity with section 1, Article XII of the Constitution, does not have the effect of exempting from taxation property other than that enumerated in section 2 of said Article, and said section is therefore not unconstitutional.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

SUBMITTED controversy between the Daly Bank and Trust Company of Butte and the board of county commissioners of Silver Bow county and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Mr. Albert J. Galen, Attorney General, Mr. W. H. Poorman, Assistant Attorney General, Mr. F. W. Mettler, and Mr. J. Bruce Kremer, for Appellants.

Mr. A. J. Campbell, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This controversy was submitted to the trial court under the provisions of sections 2050, 2051 and 2052 of the Code of Civil Procedure. The agreed statement sets forth at length the facts that the Daly Bank and Trust Company is a corporation organized under the provisions of Chapter I, Title III, Division I, Part IV, of the Civil Code of Montana, and was transacting a banking and trust business on the first Monday of March, 1903. Then follows a statement of the amount of its capital stock and undivided profits, the names of the stockholders, and the amount of capital stock owned by each, and a

statement of the bank made on the first Monday of March, 1903, showing its resources and liabilities in detail. It is then set forth that the bank made a return to the assessor as required by the provisions of sections 3691-3694 of the Political Code of Montana; that from this statement it appeared that the amount invested in real estate by the bank was \$45,000, and the amount invested in banking furniture and fixtures \$4,500; that the surplus and undivided profits amounted to \$36,500; that the real estate and personal property was returned as assessable to the bank, and the capital stock, less the amount invested in real estate and personal property, returned as taxable to the several stockholders in proportion to the number of shares owned by each; that this assessment was accepted by the assessor, and spread upon the assessment-roll, passed upon and approved by the board of equalization, the tax extended, the tax-roll turned over to the county treasurer, who demanded and received from the bank and from the stockholders, through the agency of the bank, the taxes assessed upon the property so returned; that thereafter, on December 17, 1903, without giving the bank any notice whatever, the assessor of Silver Bow county, acting under the direction of the board of county commissioners, assessed to this bank solvent credits over and above the original assessment of \$1,160,105; that by direction of the board of county commissioners this assessment was returned to the county treasurer, and by him extended on the assessment-roll, and the tax, amounting to \$19,257.73, demanded from the bank. This gave rise to this controversy, which was submitted to the district court upon the agreement that, if the court should find that the assessment of \$1,160,105 was improperly made, then the tax thereon should be canceled and held void; but in case the court should find that it was properly made, then judgment should be entered against the bank for that amount of the tax. The court found the assessment to be void, and entered judgment canceling the same. From that judgment this appeal is prosecuted.

All parties to the controversy had apparently proceeded upon

the theory that the property of a state bank or trust company can only be taxed in the manner provided by section 611 of the Civil Code. But after the tax had been paid upon the bank's assessment as returned by it, it appears that the board of commissioners entertained some doubt as to whether or not the solvent credits of a state bank or trust company are not also taxable, without any deduction being allowed or permitted for the debts of such bank or trust company, and it was apparently for the purpose of securing an adjudication upon this matter that the assessor was directed to assess to the bank its solvent credits and to direct the treasurer to collect the tax upon the same. While the circumstances attending the making of this supplemental assessment precluded the parties from presenting succinctly the matters actually in controversy, still, by brushing aside all purely technical objections, including the questions as to whether the assessor could make the assessment at the time or in the manner in which he did, whether such assessment could be made without notice to the bank, and whether or not the bank sought to have deducted from its solvent credits its *bona fide* debts or had an opportunity to do so, we are able then to determine that the parties to the agreed statement of facts sought to have settled the question: What property of a state bank or trust company is subject to taxation and in what manner?

The position of respondent is that its property is only assessable in the manner provided by section 611 of the Civil Code; while that of the appellants apparently is that solvent credits of a state bank or trust company are also taxable, and that, too, without any deduction being allowed therefrom for *bona fide* debts. We are unable to agree with either of the parties.

1. Section 611 of the Civil Code provides: "Sec. 611. The property of the corporation organized under this act shall be assessed for taxes in the same manner as the property of national banks, and no other." This section is clearly unconstitutional. In the absence of congressional action, this state could not tax any property of a national bank, and its property can only be

taxed to the extent that the general government has granted to the state permission to do so. Section 5219 of the United States Revised Statutes (U. S. Comp. Stats. 1901, p. 3502) limits that right to taxing to the bank its real estate, and to the stockholders the shares of capital stock owned by them. This excludes from taxation by the state all personal property owned by a national bank. (*First Nat. Bank v. Province*, 20 Mont. 374, 51 Pac. 821.) And under section 611, above, all the personal property of a state bank or trust company would likewise be exempt from taxation if a state bank or trust company can only be taxed in the manner in which a national bank is taxed. But this exemption, as applied to the personal property of a state bank or trust company, is in direct contravention of sections 1 and 7 of Article XII of the Constitution of Montana, which provide:

"Section 1. The necessary revenue for the support and maintenance of the state shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of *all property*, except that specially provided for in this article."

"Section 7. The power to tax corporations or corporate property shall never be relinquished or suspended, and all corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal and other purposes, on real and personal property owned or used by them and not by this Constitution exempted from taxation." (See, also, *Northwestern Life Ins. Co. v. Lewis and Clark County*, 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982.)

What property of a state bank or trust company, then, is subject to taxation? Section 1 of Article XII, above, provides that the legislative assembly shall prescribe such regulations as shall secure a just valuation for taxation of *all property*, except that particularly exempted; and section 7 of Article XII, above prescribes that every corporation shall be subject to taxation on real and personal property owned or used by it, and not exempt

from taxation; while section 3670 of the Political Code provides that "all property in this state is subject to taxation, except as provided in the next section." The next section referred to merely contains exemptions mentioned in section 2 of Article XII of the Constitution. These are general provisions, and are limited by section 17 of Article XII, which provides: "Sec. 17. The word property, as used in this article, is hereby declared to include moneys, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership, but this shall not be construed so as to authorize the taxation of the stocks of any company or corporation when the property of such company or corporation represented by such stocks is within the state and has been taxed."

The meaning of this last section is clear: To the extent that the capital stock is represented by property belonging to the state bank or trust company, and which property is liable to taxation, to that extent the stock of that bank or trust company is not taxable. The real and personal property of a state bank or trust company is to be assessed as are the same kinds of property belonging to natural persons. "All taxable property must be assessed at its full cash value." (Section 3690, Political Code.) Stocks of a state bank or trust company fall within the definition of the term "property" as given in section 17 of Article XII of the Constitution above, and in section 3680, subdivisions 1 and 4 of the Political Code, and are to be assessed to the owners at their full cash value, except to the extent that that value is represented in property which is assessed to the bank or trust company. (Section 17, Article XII, above.)

Section 3693 of the Political Code was doubtless intended to direct the method of assessing the stocks of a state bank or trust company in conformity with section 17 of Article XII above, but it fails to do so. However, as that section of the Constitution is in the nature of a prohibition, it is so far self-executing as to prohibit the assessment upon the stocks of a bank or trust company of any greater valuation than the full cash value of such stocks, less the amount of the property repre-

senting that stock, which is assessed to the bank or trust company itself.

2. The only other question presented is: May a state bank or trust company offset, as against its solvent credits, its genuine debts, as provided by section 3701 of the Political Code? That section provides: "Sec. 3701. He [the assessor] must require from each person a statement under oath, setting forth specifically all the real and personal property owned by such person, or in his possession, or under his control, at twelve o'clock M. on the first Monday in March. Such statement must be in writing showing separately * * * (3) All property belonging to, claimed by, or in the possession or under the control or management of any corporation of which such person is president, secretary, cashier or managing agent. * * * (6) All solvent credits, secured or unsecured, due or owing to such person, or any firm of which he is a member, or due or owing to any corporation of which he is president, secretary, cashier or managing agent, deducting from the sum total of such credits only such debts, secured or unsecured, as may be owing by such person, firm or corporation. No debt is to be deducted unless the statement shows the amount of such debt, as stated under oath, in the aggregate. In case of banks, the statement is not required to show the debts in detail, or to whom it is owing; but the assessor has the privilege of examining the books of such banks to verify such statement." This is a general provision applicable alike to all taxpayers, whether natural persons or corporations. (*Commonwealth v. St. Bernard Coal Co.*, 10 Ky. Law Rep. 596, 9 S. W. 709; *McAden v. Commissioners*, 97 N. C. 355, 2 S. E. 670.)

But it is contended that the effect of this statute is to exempt from taxation property other than that enumerated in section 2 of Article XII of the Constitution, and, as the provisions of the Constitution are declared to be mandatory and prohibitory, the enumerations in that section are exclusive of any other; and while at first blush it might seem that the provision in section 3701, subdivision 6, has the effect of creating exemptions,

as a matter of fact it does not. The purpose of that section is merely to ascertain the just amount and value of property for the purpose of taxation, in conformity with the provisions of section 1, Article XII above, which authorizes the legislature to make regulations such as shall secure a just valuation of all property. The decisions of courts are practically uniform in holding that statutes of this character do not have the effect of exempting property from taxation, and are not unconstitutional. (1 Cooley on Taxation, 3d ed., 269, and cases cited.)

The result of our deliberations is that a state bank or trust company may deduct from its solvent credits its just debts, which debts are defined by the Code, provided it makes the proper return to the assessor, and claims the reduction, and otherwise complies with the law; that when this is done all of its remaining property is subject to taxation, the same as the property of a natural person; and, finally, the stock is taxable to the owners at its full cash value, less the amount of taxable property of the bank or trust company representing such stock.

While the result reached is not in accord with the contention of either of the parties to this controversy, we are of the opinion that the district court committed no error in its judgment, and the judgment is therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

MICHENER, APPELLANT, v. FRANSHAM, RESPONDENT.

(No. 2,147.)

(Submitted June 22, 1905. Decided July 29, 1905.)

Attachment—Dismissal—Sheriffs.

Sawmills—Partnership—Individual Liability.

1. One who furnishes logs to others who are running a sawmill in which the former has no interest, does not, by reason of the fact that the sawed lumber is divided between the owners of the

sawmill, on the one hand, and himself, on the other, sustain such a relation to the owners of the sawmill as to be liable for any obligation contracted by one of them.

Attachment—Dismissal—Duty of Sheriff.

2. *Held*, that, under sections 903 and 911 of the Code of Civil Procedure, on the dismissal of an attachment, the sheriff is bound to account to the successful defendant for moneys collected under the attachment from such defendant's debtor.

Attachment—Dismissal—Recovery of Property Attached—Burden of Proof.

3. *Held*, that where an attachment suit against joint defendants was dismissed as to one of them, who thereupon brought suit against the sheriff to recover money collected by the latter under the attachment, the burden was on such defendant to show that the money belonged to himself, after which the burden was cast upon the sheriff to show, if he could, that such was not the fact, but that he was entitled to hold the money to apply upon any judgment which the attachment plaintiff might recover against the other attachment defendant.

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

ACTION by Thomas Michener against W. J. Fransham, sheriff. From a judgment for defendant, plaintiff appeals. **Reversed.**

Mr. John A. Luce, for Respondent.

Before a recovery could be had in this case upon any theory there must be a judgment that Vreeland is indebted to the defendant in the sum claimed. This question has never been adjudicated. Conceding that Vreeland paid the defendant money which the defendant wrongfully withholds or which defendant converted to his own use, the only way that the plaintiff could reach this money in the hands of the defendant would be by garnishment. (Code of Civil Proc., sec. 895, par. 5, sec. 900; *Brownell v. McCormick*, 7 Mont. 12, 14 Pac. 651.) No judgment had been recovered in the original action, nor was there any judgment against Vreeland. This payment in no way protected Vreeland nor released him from his obligation upon his contract with Michener. (*McPhee v. Gomer*, 6 Colo. App. 461, 41 Pac. 836, and cases cited; *Spencer v. Iowa Mortgage Co.*, 6 Kan. App. 378, 50 Pac. 1094; *Ward v. Ward*, 14 Wash. 640, 45 Pac. 312; *Hitchcock v. Miller*, 48

Mich. 603, 12 N. W. 871; *Yale v. Whitmore*, 15 La. Ann. 63; *Brown v. Ayres*, 33 Cal. 527-529, 91 Am. Dec. 655.)

It has been held that the garnishee will not be discharged by payment upon a judgment where the attachment has been dissolved (*Nelson v. Sanborn*, 64 N. H. 310, 9 Atl. 721; *Burnap v. Campbell*, 6 Gray (Mass.), 241) and that, even where money is received from a person who has no title thereto, the person so receiving it cannot be required to account to the true owner if it was received and paid out in good faith. (*Hulley v. Chedic*, 22 Nev. 27, 58 Am. St. Rep. 729, 36 Pac. 785; *McMillan v. Richards*, 9 Cal. 365, 417, 418, 70 Am. Dec. 655, and cases cited; *San Francisco v. McAllister*, 76 Cal. 246, 18 Pac. 315; *Clark v. Wyatt*, 139 N. Y. 452, 34 N. E. 1045.)

Mr. Eugene B. Hoffman, for Appellant.

The principle is that where one has money or property which is equity and good conscience he cannot keep for himself, the law will imply a promise on his part to pay it to the person who is entitled to it. (*City of Salem v. Marion Co.*, 25 Or. 449, 36 Pac. 163; *Ph. Zang Brewing Co. v. Bernheim*, 7 Colo. App. 528, 44 Pac. 380; *Salderberg v. King Co.*, 15 Wash. 194, 55 Am. St. Rep. 878, 45 Pac. 785, 33 L. R. A. 670; *Whitton v. Barringer*, 67 Ill. 551; *Alderson v. Ennor*, 45 Ill. 128; *Sterling v. Ryan*, 72 Wis. 36, 7 Am. St. Rep. 818, 37 N. W. 572; *Davis v. Pan Handle Bank* (Tex. Civ. App.), 29 S. W. 926; *Homire v. Rodgers*, 74 Iowa, 395, 37 N. W. 972; *School District v. Thompson*, 51 Neb. 857, 71 N. W. 728.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On a former appeal in this case (29 Mont. 240, 74 Pac. 448) a judgment in favor of the plaintiff and an order denying defendant's motion for a new trial were reversed because of error committed by the court in excluding certain evidence. On the second trial the court sustained a motion for nonsuit, and directed judgment for the defendant. The present appeal is from the judgment.

The only question now before us is whether the evidence introduced by plaintiff at the trial made out a case for the jury. In brief the facts are: The defendant, as sheriff, under an attachment issued out of the district court of Gallatin county in an action entitled "*Ira De Long v. Bert and Thomas Michener*," the plaintiff herein, attached in the hands of one Vreeland a debt due from him to one or both of the defendants, amounting to \$136.65. Subsequently Vreeland paid the amount of the debt to the defendant, who held it to await the result of the action. Afterward De Long dismissed the action as to the plaintiff, and judgment was entered in his favor. Thereupon he made demand upon the defendant for the amount so paid by Vreeland, claiming that the debt was due him, and that Bert Michener had no interest in it. This demand was refused, whereupon this suit was brought.

At the trial it appeared that Vreeland was under contract to build a bridge for Gallatin county over the West Gallatin river, he having assumed a contract originally let to one Thorpe. He contracted with plaintiff for lumber necessary for that purpose, and the lumber was furnished. It was obtained from logs furnished on shares by plaintiff to one Blanchard and Bert Michener, who were running a sawmill. In this mill plaintiff had no interest. It appears that after the lumber was manufactured from the logs furnished it was divided between Blanchard and Bert Michener on the one hand, and the plaintiff on the other, each taking the share agreed upon.

From this brief statement it is apparent that the debt attached by the defendant was due Thomas Michener alone. The relation between Bert and Thomas Michener created by the furnishing of the logs to be manufactured into lumber by Blanchard and Bert Michener, Thomas Michener taking his share of the product, was not such as to render the latter liable for any of the obligations of Bert Michener, and the evidence was sufficient to make out a *prima facie* case for the jury, if, as a matter of law, a sheriff is bound to account to a successful defendant in an attachment suit for moneys collected under the attachment

from such defendant's debtor. The district court seems to have proceeded upon the theory that payment of the debt to the sheriff by Vreeland was voluntary, and that there is no privity, statutory or contractual, between the plaintiff and defendant upon which the plaintiff may sustain this action. For obvious reasons this theory is erroneous; for, independently of the equitable rule deduced from the decisions, to the effect that, when the defendant has received money which in equity and good conscience belongs to the plaintiff, he ought not to be allowed to retain it, it is clear that the facts of this case bring it within the provisions of sections 903 and 911 of the Code of Civil Procedure. Under the former the sheriff may collect the debts and credits of the defendant which have been attached. His receipt operates as a discharge of the debtor. Under the latter, if the defendant recovers judgment, all proceeds of sales made under the attachment, moneys collected, and all property attached remaining in the sheriff's hands must be delivered to the defendant or his agent. Thus the duty of the defendant upon the dismissal of the action against the plaintiff in this case was clear, provided only it appeared that the money belonged in fact to the plaintiff. The burden then rested upon the plaintiff to show the debt was due from Vreeland to himself. When this was made to appear, a case was made upon which he was entitled to recover. The burden was then cast upon the defendant to show, if he could, that such was not the fact, but that he was entitled to hold it to apply upon the judgment which De Long might recover in the action against Bert Michener; otherwise the plaintiff, by the mistake of De Long in making him a defendant, and by Vreeland's payment to the sheriff under the attachment, thereby obtaining a discharge of his obligation to the plaintiff, would be deprived of his property without remedy against anyone.

During the argument attention was called to the case of *Merchants' and Miners' National Bank v. Barnes*, 18 Mont. 335, 56 Am. St. Rep. 586, 45 Pac. 218, 47 L. R. A. 737. It was urged by counsel for defendant that it is decisive of this case. There

is, however, a broad distinction between the two. The mining company, garnishee in that case, with full knowledge that the debt due from it to Tyler, the defendant, had been assigned to the plaintiff, assumed to pay it to Barnes, who actually applied it to the satisfaction of the judgment against Tyler. By the payment to Barnes after notice of the assignment by Tyler, the mining company did not discharge the debt. It voluntarily paid when it should not have done so. Barnes was not obliged to disregard the acknowledgment of its liability by the company to Tyler and desist from further proceedings under the writ, nor was he obliged to refuse payment of the amount admitted to be due. In doing as he did he committed no wrong to the bank, because the mining company's obligation to the bank was not discharged by its payment. In the case at bar Vreeland was indebted to the plaintiff, who was a defendant in the action of *De Long v. Michener*. Payment of the debt was properly made to the defendant under the writ under section 903, *supra*, and discharged Vreeland. When the action was dismissed as to plaintiff, and judgment entered in his favor, the defendant was, under section 911, *supra*, clearly bound to account to him for the money collected from Vreeland. The issue to be tried was whether the debt was due to plaintiff. This view was entertained by this court on the former appeal.

The court, therefore, erred in sustaining the motion for nonsuit and rendering judgment for the defendant. What has been said, of course, must be understood to apply only to the case as presented to this court. On a new trial the defendant will have the opportunity to rebut the case made by plaintiff, and it will be a question for the jury as to whether or not the plaintiff is entitled to recover. The judgment is reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

MR. JUSTICE MILBURN concurs.

MR. JUSTICE HOLLOWAY, being disqualified, takes no part in the foregoing decision.



CASES DETERMINED
IN THE
SUPREME COURT

AT THE
OCTOBER TERM, 1905.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. GEORGE R. MILBURN,
THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.

STATE EX REL. FLYNN, RELATOR, v. DISTRICT COURT
OF FIFTH JUDICIAL DISTRICT ET AL., RESPOND-
ENTS.

(No. 2,237.)

(Submitted October 10, 1905. Decided October 16, 1905.)

*Certiorari—Contempt—Jurisdiction—Written Charges—Ne-
cessity—Water Commissioners—Powers.*

Water Commissioners—Ministerial Officers—Contempt.

1. The Act of 1905, relative to the appointment of commissioners to measure and divide water among persons declared by decree of court to be entitled thereto, and empowering such commissioners to arrest any person interfering with the distribution made by them (Session Laws, 1905, p. 144), does not constitute them judicial officers, in the sense that violations of their orders are contempts committed in the immediate view and presence of the court.

Certiorari—Contempt—Written Charges—District Court—Jurisdiction.

2. *Certiorari* lies to annul an order of the district court punishing relator for contempt, alleged to have been committed in interfering with the distribution of water by a commissioner appointed in pursuance of the Act of 1905 (Session Laws, 1905, p. 144), where written charges were not filed by such commissioner, setting forth in direct language the facts constituting the contempt.

CERTIORARI. Original application by the state, on the relation of Thomas Flynn, against the district court of the fifth judicial district in and for Beaverhead County, and Hon. Lew. L. Callaway, judge thereof, for a writ of review to annul an order adjudging relator guilty of contempt. Annulled.

Mr. C. B. Nolan, for Relator.

Mr. Albert J. Galen, Attorney-General, *Mr. Edwin Norris*, and *Mr. H. B. Melton*, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Application for writ of review to annul an order of the district judge of the fifth district adjudging the relator guilty of contempt.

On October 1, 1888, the district court of Beaverhead county, in a cause entitled "*Selway et al. v. Thomas Flynn et al.*," rendered and entered a decree adjudicating the rights of the respective parties plaintiff and defendant to the use of the waters of Black Tail Deer creek in that county, and perpetually enjoining them from interfering with each other in the exercise of these rights. The date of the relator's earliest appropriation, as found and fixed in the decree, is April, 1881, and the amount five hundred and fifty inches. To satisfy the rights prior in date to those of the relator, there are required about two thousand seven hundred inches. On July 12th of this year, and during the days immediately succeeding, the volume of water flowing in the creek was much less than this amount. The commissioner had made distribution of the waters under the decree, and there were not enough to supply all prior rights, so that it was necessary to close relator's headgate and exclude the water from his ditch entirely. This was done. Immediately thereafter, notwithstanding the action of the commissioner, the relator so arranged his headgate that about three inches of water were diverted from the stream and allowed to flow down to the relator's house,

where it was consumed, under the claim that the relator had a right under the decree to divert any amount required to supply his domestic uses. Thereupon the commissioner arrested him and took him before the district judge, who after a hearing, adjudged him guilty and sentenced him to pay a fine. There was no affidavit presented to the judge setting forth the facts constituting the contempt.

The proceeding was had under the provisions of section 1 of the Act of 1905 (Session Laws, 1905, c. 64, p. 144), which makes it the duty of district judges under certain circumstances, to appoint commissioners to measure and divide waters among the persons declared by decree of court to be entitled to the use of them. This section provides among other things, that "such commissioner or commissioners shall have authority to enter upon any ditch, canal, aqueduct or other source for conveying the waters affected by such decree, and to visit, inspect and adjust all headgates, or other means of distribution of such waters, and shall have the same power as a sheriff or constable to arrest any or all persons interfering with the distribution made by him, and to take such person so arrested before the judge of the district court for trial for contempt of the decree of said court."

The contention of relator is that the order complained of is void and in excess of jurisdiction, for that the arrest was made and the conviction had without an affidavit being first presented to the district judge setting forth the facts constituting the contempt. The attorney-general, appearing for the respondents, contends that under the Act cited the commissioner occupies the same relation to the court as does a referee or arbitrator, and that a violation of his order or an obstruction of him in the performance of his duties by a party to the decree is a contempt in the immediate view and presence of the court, and not a constructive contempt. It is a sufficient answer to the latter contention to observe that the Act grants to the commissioner the same power as that possessed by a sheriff or constable to make arrests. It does not constitute him a judicial officer, but merely a ministerial or executive agent to

enforce the provisions of the decree and to make arrests in the performance of his duties, just as a sheriff or constable may make them, and not otherwise.

The mode by which contempts are to be punished as such is prescribed in section 2172 et seq. of the Code of Civil Procedure. It is only where a contempt is committed in the presence of the court or judge that the formality of a written charge may be dispensed with. The Act of 1905, *supra*, does not purport in any way to amend or modify these provisions. Such being the case, these provisions are the only guide, and they must be observed. The contempt not being committed in the presence of the court or judge, neither the court nor judge had authority to proceed, except upon a written charge on oath setting forth in direct language the facts constituting the contempt. (*Boston & Mont. Con. C. & S. Min. Co. v. Montana Ore Pur. Co.*, 24 Mont. 117, 60 Pac. 807.) When the relator in this case was brought before the judge by the commissioner, the latter made an oral statement to the judge, who thereupon proceeded to hear the evidence and make the order complained of.

At the hearing counsel for relator devoted some time to a discussion of the question whether or not the Act of 1905 authorizes the commissioner to make arrests without warrant, and insisted that, if such interpretation be given to the statute, it must be declared unconstitutional. The statute does not in terms authorize an arrest without warrant; nor is it necessary now to consider the question whether it does so by implication. The only question now before us is whether the judge had jurisdiction to proceed with a hearing without a written charge. We think he did not. The order is therefore annulled.

Annulled.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. HODGDON, RELATOR, v. DISTRICT
COURT OF TENTH JUDICIAL DISTRICT, RE-
SPONDENT.

(No. 2,242.)

(Submitted October 10, 1905. Decided October 16, 1905.)

Criminal Law—Appeals from Justices' Courts—Notice—Judgments for Fine—Undertakings on Appeal—Necessity.

Criminal Law—Justices' Courts—Appeals—Notice—County Attorneys.

1. Failure to serve notice upon the county attorney of an appeal to the district court from a judgment of conviction had in a justice's court is not ground for the dismissal of the appeal.

Criminal Law—Justices' Courts—Judgments for Fine.

2. A judgment rendered by a justice of the peace, in a case of misdemeanor, imposing a fine, with imprisonment in the county jail until the fine be paid, is not a judgment for fine only, within the meaning of section 2714 of the Penal Code.

Criminal Law—Justices' Courts—Appeals—Undertaking—Necessity.

3. An undertaking on appeal from a judgment of conviction for a misdemeanor, rendered by a justice of the peace, imposing a fine and remanding defendant to the county jail until such fine be paid, is not necessary to confer jurisdiction on the district court to entertain the appeal.

Appeal—Undertaking—When Necessary.

4. An undertaking on appeal, being purely a statutory regulation, may not be exacted unless the statute specifically makes such requirement.

ORIGINAL. *Certiorari* by the state, on the relation of C. G. Hodgdon, against the district court of the tenth judicial district. Order annulled.

Mr. Wm. Wallace, Jr., Mr. Chas. Donnelly, and Messrs. Huntoon & Smith, for Relator.

Mr. Albert J. Galen, Attorney-General, and Mr. W. H. Poorman, Assistant Attorney-General, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court

Certiorari, to review an order of the tenth judicial district court.

On June 12, 1905, the relator herein was by a justice court in Fergus county adjudged guilty of a misdemeanor and sentenced to pay a fine of \$150, and to stand committed to the county jail until such fine was paid. On June 17th he filed in the justice court his notice of appeal to the district court, and accompanied such notice with a certified check for double the amount of the fine and costs, which check appears to have been received as cash. The transcript of the justice's docket and the files in the case were duly lodged with the district court, the cause docketed, and set for trial for August 8, 1905. On the day set for trial the county attorney moved the court to dismiss the appeal upon the grounds that an undertaking on appeal had not been given, and that the notice of appeal had not been served upon him. This motion was sustained, and the appeal dismissed. There is not any contention here as to the appropriateness of the remedy sought, and there was not any merit in the last ground of the motion to dismiss the appeal.

The only question submitted for our determination is: Was an undertaking on appeal necessary to confer upon the district court jurisdiction of the appeal? It is contended by respondent that section 2714 of the Penal Code is applicable to a case of this character, that the provisions of that section are mandatory, and the giving of an appeal bond is a *sine qua non* to the perfection of an appeal from a judgment of a justice of the peace court imposing a fine as punishment. But it is not necessary for us to attempt to determine the meaning of section 2714, above, or the following section, 2715; for the judgment rendered by the justice of the peace court in this instance was not of the character therein described. It was not a judgment for a fine only, but a judgment for a fine and imprisonment until the fine should be paid, as authorized by section 2707 of the Penal Code.

That the legislature recognized a distinction between a judgment for fine, and one for fine with imprisonment until the fine be paid, is apparent from sections 2718 and 2719 of the Penal Code. If the judgment is for fine only, the defendant

is entitled to be discharged from custody as soon as the judgment is given. (Section 2718, above.) But if the judgment is for fine and imprisonment until paid, as in this instance, then the defendant may be detained in custody until such fine is paid or until he shall have served one day for every \$2 of such fine (section 2719, above),—(it is apparent that the word “or” used in section 2719 above, in the sentence “When a judgment is entered imposing a fine, or ordering the defendant to be imprisoned,” etc., should be “and”),—unless he avails himself of his right to appeal and gives bail as provided by section 2716 of the Penal Code. The record is so incomplete in this instance that we are unable to determine whether the certified check was intended as an appeal bond, or as bail under the provisions of section 2716; but it is immaterial so far as this proceeding is concerned.

Having determined that the judgment in this instance was not one for fine only, we recur to the original question for solution: Was it necessary for the defendant to give an undertaking on appeal? Under the provisions of the Revised Statutes of 1879 (section 504, Third Division), the giving of an undertaking was necessary to complete an appeal from a judgment in a criminal case in a justice of the peace court; and these provisions were carried forward into the Compiled Statutes of 1887 as section 510, Third Division. The law remained unchanged until the adoption of the Codes of 1895, when in lieu of section 510 above, section 2713 of the Penal Code was adopted, which reads: “Sec. 2713. An appeal is taken by the defendant by giving notice in open court of his intention so to do, at the time of the rendition of the verdict or judgment, or by filing with the justice within five days thereafter, a written notice of appeal.”

As indicating the policy of the law, it is sufficient to say that there is not any appeal bond required in case of an appeal from the district to the supreme court in criminal cases, and neither are there any provisions in the Criminal Practice Act applicable to justice of the peace courts which in terms require such bond in case of an appeal from a judgment

of the character of this one—if, indeed, at all. As further illustrating the emphasis which the law lays upon the necessity for an undertaking on appeal where such undertaking is required, reference need only be had to the Code provisions applicable to appeals in civil cases. With respect to an appeal in a civil case from a justice of the peace court to the district court, section 1763 of the Code of Civil Procedure provides: "Sec. 1763. An appeal from a justice's or police court is not effectual for any purpose unless an undertaking be filed, with two or more sureties, in a sum equal to twice the amount of the judgment, including costs," etc. With respect to a like appeal from the district to the supreme court, section 1724 of the Code of Civil Procedure among other things provides: " * * * The order of service is immaterial, but the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal, an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing."

At common law an undertaking on appeal was never required. (1 Ency. of Pl. & Pr. 965, and cases cited.) It is purely a statutory regulation, and, unless the statute specifically makes such requirement, it cannot be exacted at all; and since the legislature enacted section 2713, above, which omits any reference to an undertaking to effectuate an appeal, in lieu of section 510, Compiled Statutes, 1887, which specifically required such an undertaking, we must assume that this was intended as a legislative declaration that such undertaking should no longer be required, unless the contrary appears from subsequent sections applicable to particular cases; and there being no such reference to an appeal from a judgment of the character of the one now under consideration, no undertaking was necessary and the district court erred in dismissing the appeal. The order dismissing the appeal is therefore annulled.

Annulled.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

MACKEL, APPELLANT, v. BARTLETT, RESPONDENT.

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(No. 2,155.)

(Submitted October 4, 1905. Decided October 21, 1905.)

*Attorney and Client—Privileged Communications—Practice—
Appeal—Record—Evidence—Nonsuit—Review.***Appeal—Nonsuit—Ground of Motion too General.**

1. A motion for nonsuit upon the ground "that the plaintiff has failed to make out a case" was too general to merit consideration at the hands of the district court.

Attorney and Client—Privileged Communications.

2. Information obtained by an attorney from the defendant, in an action brought by a trustee in bankruptcy to recover the amount of an alleged preference, who, while introducing to the attorney the person who made the preference and who was then in search of legal advice, made certain statements in relation to the business affairs of the person so introduced, is not privileged, since the relation of attorney and client did not exist between the defendant and the legal adviser at the time the statements were made; and the supreme court upon review is not bound to accept the assertion of the attorney that "they called upon me for the purpose of obtaining my services as an attorney at law" as conclusive.

Practice—Appeal—Record—Evidence.

3. When the question raised by appellant has to do with the admissibility of a particular item of evidence which, if not rejected, would have tended to prove the issue, the record need not contain all of the evidence.

Appeal—Errors Reviewed.

4. The supreme court on appeal will review only the errors presented by the appellant, not those suggested by respondent.

Appeal—Nonsuit—Review—Scope.

5. On appeal from an order of nonsuit, the sufficiency of the complaint will not be considered, where it was not made a ground of the motion as submitted to the trial court.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by Alexander Mackel, as trustee in bankruptcy of the estate of Frederick A. Bartlett, against Henry R. Bartlett. From a judgment of nonsuit, plaintiff appeals. Reversed.

Mr. John J. McHatton, for Respondent.

The bill of exceptions does not purport to contain all of the evidence in the case, and the court cannot review the evi-

dence or the order granting the nonsuit, for that reason. (*Ramsey v. Burns*, 27 Mont. 154, 69 Pac. 711; *Currie v. Montana Cent. Ry. Co.*, 24 Mont. 123, 60 Pac. 989; *State v. Shepphard*, 23 Mont. 323, 58 Pac. 868.) The only questions which can be reviewed upon this appeal are questions of errors of law committed by the trial court and which, by the statute, are made grounds for a new trial. (*Withers v. Kemper*, 25 Mont. 432, 65 Pac. 422.) The appellate court will not review the granting of a motion for a nonsuit where the evidence is not all before the court. (*Lockey v. Horsky*, 4 Mont. 457, 463, 2 Pac. 19; *Rooney v. Tong*, 4 Mont. 597, 600, 2 Pac. 312.) Where the evidence, by reason of the insufficiency of the record or otherwise, is not before the court for consideration, it will be presumed that the same supports the judgment or decision. (*Wilson v. Davis*, 1 Mont. 183, 189; *Gropper v. King*, 4 Mont. 367, 369, 1 Pac. 755; *Beck v. Beck*, 6 Mont. 318, 12 Pac. 694; *Bass v. Buker*, 6 Mont. 442, 443, 12 Pac. 922; *Barger v. Halford*, 10 Mont. 57, 60, 24 Pac. 669; *Beatty v. Murray Placer Min. Co.*, 15 Mont. 314, 316, 39 Pac. 82; *Burns v. Paulsen*, 16 Mont. 333, 334, 40 Pac. 789.) Every reasonable intendment is in favor of the action of the trial court, and the burden of establishing error is upon him who assails the ruling. (*State v. Calder*, 23 Mont. 504, 59 Pac. 903.)

The court did not err in excluding the testimony of the witness Barlow. There is no question but that Barlow was consulted by both Henry R. and Frederick A. Bartlett, in his capacity as an attorney. "I had but one conversation with Frederick A. Bartlett and Henry R. Bartlett, and they called upon me for the purpose of obtaining my services as an attorney at law, and all the information gained from them was in the capacity of an attorney."

This is the absolute and unqualified statement of the witness, and is a statement of fact. It cannot be argued away. The situation is fully covered by Code of Civil Procedure, section 3163, subdivision 2. (See, also, *Davis v. Morgan*, 19 Mont. 141, 47 Pac. 793; *Smith v. Caldwell*, 22 Mont. 331, 56 Pac.

590; *State v. Snowden*, 23 Utah, 318, 65 Pac. 479; *Bruley v. Carvin*, 105 Wis. 625, 81 N. W. 1038, 48 L. R. A. 839; *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848; *Basye v. State*, 45 Neb. 261, 63 N. W. 811; *Hartness v. Brown*, 21 Wash. 655, 59 Pac. 491; *In re Aspinwall*, 7 Ben. 433, Fed. Cas. No. 591.) The case of *Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627 is directly in point. (See, also, *Loveridge v. Hill*, 96 N. Y. 222, 226.)

Mr. John A. Shelton, for Appellant.

Section 3163, subdivision 2 of the Code of Civil Procedure should receive a strict construction inasmuch as it tends to prevent a full disclosure of the truth. (*Appeal of Turner*, 72 Conn. 305, 44 Atl. 310; *Smith v. Caldwell*, 22 Mont. 231, 56 Pac. 590; *Carroll v. Sprague*, 59 Cal. 655.) That the ruling of the district court was erroneous is supported by three distinct propositions: 1. The relation of attorney and client was not shown to exist between the witness and the defendant. (*Smith v. Caldwell*, *supra*; *Williams v. McKissack*, 117 Ala. 441, 22 South. 489.) 2. The communications testified by witness Barlow to have been made by defendant were not made in the course of professional employment. 3. The communications testified to by the witness Barlow were not confidential communications.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action brought by a trustee in bankruptcy to recover the amount of an alleged preference.

The complaint alleges that prior to February 6, 1899, Frederick A. Bartlett was indebted to the First National Bank of Butte in the sum of \$1,530, which indebtedness was evidenced by a promissory note theretofore executed by the said Frederick A. Bartlett, with Henry R. Bartlett, this defendant, as surety, and delivered to the bank; that on February 6, 1899, this note was past due; that Frederick A. Bartlett was then, and for a long time prior thereto had been, insol-

vent and then contemplated filing a petition in bankruptcy; that Henry R. Bartlett was then solvent and able to respond in the full amount of said indebtedness to the bank; that on the said 6th day of February, Frederick A. Bartlett, at the suggestion and instigation of Henry R. Bartlett, paid said indebtedness to the bank, and that such payment was made by Henry R. Bartlett, acting as the agent of Frederick A. Bartlett. It is then alleged that at the time of making such payment Henry R. Bartlett had reason to believe and did believe that Frederick A. Bartlett was, and for a long time prior thereto had been, insolvent; that such payment was made with the intention on the part of Frederick A. Bartlett to prefer Henry R. Bartlett over his other creditors, and that the effect of such payment was to discharge Henry R. Bartlett of his liability to the bank; that on February 8, 1899, Frederick A. Bartlett filed his petition in bankruptcy in the United States district court and was by that court adjudged a bankrupt, and this plaintiff selected as trustee and duly qualified and entered upon the discharge of his duties as such. The complaint alleges a demand upon the defendant to pay over to the trustee the sum so paid to the bank and the defendant's refusal to comply with that demand.

To this complaint the defendant interposed a general and special demurrer, which was overruled, and defendant then answered, admitting the corporate existence of the First National Bank, the indebtedness of Frederick A. Bartlett to the bank, and the fact that defendant was a surety on the note evidencing such indebtedness; that on the 6th day of February, 1899, such note was past due; that defendant was then solvent and had property out of which the bank could have forced the collection of said indebtedness; that Frederick A. Bartlett paid said bank through the defendant as his agent; and that this defendant suggested to Frederick A. Bartlett to make such payment. Defendant also admits that demand was made upon him to refund to the trustee the money so paid over to the bank, and that he refused to comply with the demand. The

answer denies all the other material allegations of the complaint.

Upon the trial the plaintiff offered evidence tending to sustain the allegations of his complaint with reference to the adjudication of Frederick A. Bartlett as a bankrupt, plaintiff's appointment as trustee, the insolvency of Frederick A. Bartlett, and some evidence tending to show knowledge on the part of Henry R. Bartlett of Frederick A. Bartlett's insolvency at the time of the payment of the note to the bank, and upon this issue also offered in evidence the testimony of one Vernon J. Barlow, given by way of a deposition, which deposition, omitting the questions, is as follows: "My name is Vernon J. Barlow. I am a lawyer by profession, and I reside at Butte, Montana, and have, since November, 1897. I have known Henry R. Bartlett since December, 1897. I am acquainted with Frederick A. Bartlett, and have known him since the summer of 1898. He was introduced to me by Henry R. Bartlett in my office some time during the summer of 1898. I think they are brothers. Henry R. Bartlett and Fred. A. Bartlett came to my office together. Henry R. Bartlett stated that Fred. A. Bartlett had informed him that his business was declining, and that he was not making enough money to pay his clerk or his rent, and that he had decided to make an assignment, and that he wanted to see an attorney, and that he (Henry) had recommended me, and came with him to introduce him. I do not remember that Henry R. Bartlett was to be the preferred creditor. It is my recollection that he was an indorser for Fred. A. Bartlett at the First National Bank for about fifteen hundred dollars (\$1,500.00). I know of nothing more that is material to the issue in the above-named cause." Cross-examination: "I had but one conversation with Frederick A. Bartlett and Henry R. Bartlett, and they called upon me for the purpose of obtaining my services as an attorney at law, and all the information gained from them was in the capacity of an attorney." This offer was objected to on the ground that the witness Barlow was an attorney and as such was consulted by Frederick A. and Henry R.

Bartlett, and that the information gained was privileged. This objection was sustained, and the evidence excluded.

At the close of plaintiff's case the defendant moved for a nonsuit, upon the grounds that the plaintiff had failed to prove the insolvency of Frederick A. Bartlett at the time of the payment to the bank; that plaintiff had failed to show that defendant, Henry R. Bartlett, had any knowledge, or any reason to believe, that Frederick A. Bartlett was insolvent, or that by the payment of said indebtedness Frederick A. Bartlett intended to prefer Henry R. Bartlett over his other creditors, or that such payment was made in contemplation of bankruptcy, and "that the plaintiff had failed to make out a case." This motion was sustained and a judgment in favor of defendant for costs rendered. From an order overruling his motion for a new trial the plaintiff appeals. The errors assigned are: 1. The exclusion of the testimony of Vernon J. Barlow; 2. The granting of the motion for nonsuit; and, 3. The denial of plaintiff's motion for a new trial.

The last ground of the motion for nonsuit, namely, "that the plaintiff has failed to make out a case," was too general to be considered by the court below (*Wright v. Fire Ins. Co.*, 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211; *Jacobs Sultan Co. v. Union Mercantile Co.*, 17 Mont. 61, 42 Pac. 109; 1 Spelling on New Trial and Appellate Practice, 346, and cases cited), and we must presume that the court made the order with reference to other grounds mentioned.

There was some evidence introduced tending to show the insolvency of Frederick A. Bartlett at the time of the payment of the note, and, if the testimony of the witness Barlow had been admitted, it would have tended further to show such insolvency and knowledge of such fact by the defendant, Henry R. Bartlett; and, if the court committed error in excluding that evidence, the order denying the plaintiff a new trial must be reversed, for with that evidence admitted there was sufficient to go to the jury.

It is apparent that the court proceeded upon the theory that the deposition of Barlow showed upon its face that the in-

formation which he received from Henry R. Bartlett, respecting Frederick A. Bartlett's financial condition a few months prior to the date of the payment to the bank, was received by him while acting as attorney for Henry R. Bartlett, and therefore the communication of such information was privileged, under subdivision 2 of section 3163 of the Code of Civil Procedure. In this we think the trial court was in error.

Section 3163, subdivision 2, reads as follows: "Sec. 3163. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: * * * (2) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment. * * * "

It is to be observed, first, that the relation of attorney and client must have existed between Henry R. Bartlett and the witness Barlow; and, second, the communication by Henry R. Bartlett to Barlow must have been made in the course of such professional employment of the witness Barlow as such attorney. The deposition wholly fails to show that the relation of attorney and client existed between Barlow and Henry R. Bartlett. On the contrary, it shows that Henry R. Bartlett recommended Barlow to Frederick A. Bartlett, who was seeking the aid of an attorney, and only came to Barlow for the purpose of introducing Frederick A. Bartlett. It is true that on cross-examination the witness says, in answer to a question formed to apply to both Henry R. Bartlett and Frederick A. Bartlett, that *they* called upon him for the purpose of obtaining his services; but that is not inconsistent with what he had said already. They did come to him for that purpose, but the services were to be rendered to Frederick A. Bartlett and not to Henry R. Bartlett; and, while the information may have been obtained by Barlow as an attorney, it was as the attorney for Frederick A. Bartlett, and such information as he

received from Henry R. Bartlett was in no sense privileged. But this is attaching to the cross-examination of the witness more importance than it merits; for the answer of the witness is in the nature of his own conclusion, while on his direct examination he assumed to state facts from which the court could determine whether or not the relation of attorney and client actually existed between him and Henry R. Bartlett, and upon this review this court is not bound to accept Barlow's conclusion that he was acting as such attorney for both Frederick A. and Henry R. Bartlett, even if his language could be construed as amounting to such conclusion.

In *Smith v. Caldwell*, 22 Mont. 331, 56 Pac. 590, this court had occasion to consider a very similar state of facts. Kelly and Almich went to Stephenson, who was an attorney, to have a chattel mortgage drawn, furnishing to the attorney memoranda of the property to be included, the amount to be secured, etc. In the course of their conversation with, and in the presence of, the attorney, the parties to the mortgage were alleged to have made certain statements. Upon the trial Stephenson was examined as a witness, the purpose being to elicit from him those statements. The question was raised that Stephenson was acting in the capacity of an attorney and that the communication was privileged. Upon the direct examination of Stephenson the facts were brought out as in this case, but upon his cross-examination Stephenson said: "I will state to the court that whatever knowledge I acquired, I certainly acquired acting in the capacity of an attorney for the parties to the mortgage." On appeal, this court refused to be bound by Stephenson's conclusion, but, disregarding his notion as to the relation existing between him and the parties to the mortgage, this court said: "From the examination of the witness Stephenson, as shown by the record, it appears that he acted in the transaction about which he was asked, not as counsel to whom Almich and Kelly went to obtain advice, but as a scrivener only. What he learned seems to have been a mere incident to the ministerial office of writing the instrument, and the notarial work of authentication for record. In-

formation obtained in this way is not privileged, even though the scrivener be an attorney at law."

The cross-examination of Barlow in this case at most only shows his conclusion of the matter, as did Stephenson's in the case referred to, while in this case, as in that, the facts disclosed by his testimony in chief show that the relation of attorney and client between him and Henry R. Bartlett did not exist, and that the statements were not even made in contemplation of the employment of Barlow by Henry R. Bartlett.

In the *Caldwell Case* above, this court quoted with approval from the California court as follows: "Knowledge acquired during the time the relation exists is not privileged, unless it is acquired in the course and for the purpose of his (the attorney's) employment. (*Satterlee v. Bliss*, 36 Cal. 489.) The party seeking to suppress the evidence must sustain the burden of showing that it comes within the rule. (*Carroll v. Sprague*, 59 Cal. 655.) 'And it must appear that the witness learned the matter only as counsel or attorney or solicitor for the party, and not in any other way, and that it was received professionally and in the course of business.' (*Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131.) The communication must be confidential, and so regarded, at least by the client, at the time. (*Id.*)"

Viewed in the light of these authorities, which merely state elementary principles of law, this record fails to show that the relation of attorney and client existed between the witness and Henry R. Bartlett, and the court was in error in excluding the deposition.

Respondent urges that this court will not review the matters presented in this instance, for the reason that the record does not purport to contain all the evidence. But with reference to this we reply, in the language of the court of appeals of Illinois: "When the error relied on is that the verdict or finding is contrary to the evidence, then, to avail of such assignment of error, it must appear that all the evidence has been

preserved by the bill of exceptions; but when there is no such assignment, but the question is as to the rejection of evidence tending to prove the issue, it is not necessary for the bill of exceptions to contain all the evidence. (*Nason v. Letz*, 73 Ill. 371; *Schmidt v. Chicago etc. Ry. Co.*, 83 Ill. 405, 412." (*Kimball Co. v. Cruikshank*, 90 Ill. App. 3.)

It is further urged that this court will not direct a new trial if, as respondent contends, the complaint does not state a cause of action. But on appeal this court reviews the errors presented by the appellant, not those suggested by the respondent (*Benepe-Owenhouse Co. v. Scheidegger*, 32 Mont. 424, 80 Pac. 1024); and, where the error alleged is the granting of a nonsuit, this court will review the action of the lower court with reference to the condition of the case as presented to that court when it passed upon the motion, and will consider only the grounds urged in the motion for nonsuit. (*Raimond v. Eldridge*, 43 Cal. 506; *Shain v. Forbes et al.*, 82 Cal. 577, 23 Pac. 198.) In this last case the court said: "It is settled law in this state that when a party moves for a nonsuit, the grounds of the motion must be precisely stated, and no other grounds than those stated can be considered by the court in granting or refusing the motion, or by the appellate court in reviewing the order. (*Coffey v. Greenfield*, 62 Cal. 602; *Gardner v. Schmaelzle*, 47 Cal. 588; *Raimond v. Eldridge*, 43 Cal. 506; *Hayne on New Trial and Appeal*, sec. [117] 116.)"

The rule stated above is a general one, and whether it will apply in case it appears to the appellate court that the complaint not only does not state a cause of action, but cannot be amended to do so, we do not now determine. The order of the court is reversed, and the cause remanded, with direction to grant a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

LEHMAN, APPELLANT, v. KNAPP, RESPONDENT.

(No. 2,162.)

(Submitted October 6, 1905. Decided October 25, 1905.)

Appeal—Verdict—Conflicting Evidence.

1. Where the evidence is conflicting, the verdict will not be disturbed on appeal.

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

ACTION by Charles Lehman, doing business under the firm name and style of Charles Lehman & Co., against Lottie Knapp, commonly known as Georgia Day. From a judgment for defendant, plaintiff appeals. Affirmed.

Messrs. Blackford & Blackford, for Appellant.

The jury were told in Instruction No. 8, that the presumption that the witness tells the truth may be repelled by his appearance on the stand, and that his credibility is measured by his appearance on the stand, his intelligence or lack of intelligence and from all surrounding circumstances appearing on the trial. Such is not the law in this state. The witness through embarrassment, physical deformity, or otherwise, may present a bad appearance to the jury and yet what he states may be absolutely true. He may appear, also, to lack intelligence and yet what he states may not vary from the truth in any particular. Yet the court here told the jury that they must take into consideration all these things in weighing the evidence of the witnesses and in determining which were the more worthy of credit and to give credit accordingly. Upon this question see *Fries v. American Lead Pencil Co.*, 141 Cal. 610, 75 Pac. 164.

Mr. Frank E. Smith, for Respondent.

MR. JUSTICE MILBURN delivered the opinion of the court.

This case is on appeal from an order denying plaintiff's motion for a new trial and from the judgment. Plaintiff sued defendant for a balance of \$985.30 for merchandise alleged to have been sold and delivered to the defendant at her special instance and request. Defendant's answer denied that the plaintiff ever sold or delivered any of said goods to her, except certain articles sold and delivered to her amounting to the sum of \$8.70, which sum she offered to pay at once. The case was tried before a jury, which found for defendant, and judgment was entered accordingly.

Although appellant devotes part of his argument to the point that the court's instructions were inconsistent in respect of the sum of \$8.70, admitted by defendant to be due from her to plaintiff, still there is no complaint made to us that the court below did not cause judgment to be entered for that sum.

The record of the evidence shows that a woman called Leona, and the defendant, went to plaintiff to buy goods to furnish a house to be kept by the said Leona. The house belonged to defendant, and was by her leased to the other woman. The sole question raised by the pleadings and the evidence was this: To whom were the goods sold? Plaintiff charged them on his books to the defendant, and attempted to prove that they were sold to her on her own credit as original purchaser, and that she promised to pay for them.

Appellant specified error in that "the verdict is not sustained by the evidence, upon the ground that the goods were not sold and delivered expressly upon the credit of the defendant." We suppose counsel mean that the contention of the defendant that the goods were not sold and delivered upon her credit is not sustained by the evidence. The evidence is conflicting upon the point, in our opinion, and for that reason the verdict may not be disturbed.

The second specification is like the one above mentioned. The other specifications relate to the instructions of the court

to the jury. Considering the theory upon which the case was tried by counsel and submitted, to-wit, solely upon the question as to whether the goods were sold upon the credit and original promise of defendant to pay for them, we do not find that the court erred in its instructions relating to the question so raised.

Attack is made upon the court's charge as to the credibility of witnesses. The opinion of the California court cited by appellant (*Fries v. American Lead Pencil Co.*, 141 Cal. 610, 75 Pac. 164) is not in point, as the instruction in that case is far from similar to the one given by the court in this case. We do not think that the instruction complained of was erroneous.

Not finding error on the part of the court, and the jury being, as we think, justified in its finding, the order and judgment appealed from must be affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

MOORE, RESPONDENT, v. SKYLES, APPELLANT.

(No. 2,159.)

(Submitted October 5, 1905. Decided October 25, 1905.)

*Principal and Agent—Special Agents—Scope of Authority—
Duty of Ascertaining—Postoffice Money Orders—Transfer—Title of Transferee.*

Principal and Agent—Special Agents.

1. One to whom a money order was given by another, with instructions to see if it was all right, and, if so, to get it cashed, was a special agent of the latter, within the meaning of Civil Code, section 3072.

Principal and Agent—Scope of Authority of Agent.

2. All persons dealing with an agent are bound to ascertain the scope of the agent's authority, and if they do not, they deal with him at their peril.

Postoffice Money Orders—Transfer—Title of Transferee.

3. Section 4037, United States Revised Statutes, provides that more than one indorsement of a money order shall render the same

invalid. Defendant was the indorsee of a money order which he sent by an agent to the postoffice on which it was drawn in order to get it cashed. The agent sold the order to plaintiff, indorsing it with his own name. *Held*, that plaintiff obtained no title to the order.

Appeal from District Court, Flathead County; D. F. Smith, Judge.

ACTION by Ross Moore against John F. Skyles. From a judgment rendered for plaintiff on appeal from a justice's judgment, and from an order denying a new trial, defendant appeals. Reversed.

Mr. B. J. McIntire, and Mr. W. H. Poorman, for Appellant.

Mr. F. L. Gray, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was commenced in a justice of the peace court by the plaintiff to recover the sum of \$31. Judgment was rendered in favor of plaintiff, and defendant appealed to the district court, where the plaintiff again prevailed, and the defendant appeals to this court from the judgment and from an order denying his motion for a new trial.

The facts disclosed by the record are: That on October 13, 1903, the postoffice at Kendall, Montana, issued to Alex. Wilson a postal money order for \$31, payable at Kalispell, Montana. This money order was indorsed by Wilson and transferred to this defendant, Skyles. Upon December 1, 1903, Skyles sent the order by one J. J. Kelley to the postoffice at Kalispell, with instructions to see if it was all right, and, if so, to get it cashed. Kelley took the order to the postoffice at Kalispell, where payment was refused for the reason that the order was then payable to Skyles and Skyles had not indorsed it. Kelley then sold the order to this plaintiff, indorsed it with his own name, and received for it the full sum of \$31. Plaintiff then presented the order for payment, which was again

refused for the reason advanced to Kelley. Moore then sent the order back to the defendant at Whitefish, Montana, for his indorsement; but, as the defendant had not received anything whatever from Kelley for the order, he indorsed it, sent it to the Postoffice department, and himself received payment in full. Moore then brought this suit for damages in the sum of \$31, the face value of the order. These facts were brought out by the testimony of plaintiff's witnesses, and this is the substance of all the evidence introduced. The defendant did not offer any testimony, but moved for a nonsuit, which was denied. The jury returned a verdict in favor of the plaintiff, and judgment was rendered thereon.

From these facts it appears that Kelley was a special agent of Skyles, within the definition given in section 3072 of the Civil Code, which reads as follows: "Sec. 3072, An agent for a particular act or transaction is called a 'special agent. All others are general agents.'" (See, also, *Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822.) All persons dealing with an agent are bound to ascertain the scope of the agent's authority, and if they do not they deal with him at their peril. (*Bank of Deer Lodge v. Hope Min. Co.*, 3 Mont. 146, 35 Am. Rep. 458; *First Nat. Bank v. Hall & Co.*, 8 Mont. 341, 20 Pac. 638; *Dodge v. Birkenfeld*, 20 Mont. 115, 49 Pac. 590; *Helena Nat. Bank v. Rocky Mt. Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829.)

When this order was presented to Moore he was apprised by the order itself, first, that it was originally payable to Wilson; second, that Wilson had transferred the same to Skyles by indorsement; third, that no further indorsement of it could be made without rendering the order invalid under section 4037, Revised Statutes of the United States [U. S. Comp. Stats. 1901, p. 2747]; and, fourth, that Skyles had not attempted to transfer it. There was not anything to indicate that Kelley had or could obtain any interest in the order, save only his possession of it; and, so far as this record shows, Kelley assumed to transfer title in his own name and by his own indorsement, and did not assume to act as the

agent of Skyles or in any other capacity than as the owner of the order. As Skyles was the owner, and Kelley had no authority to part with it to Moore, Moore did not receive any better title than Kelley had. If Moore was dealing with Kelley as the owner of the order, he obtained no title, for Kelley had none, and this was apparent from the order itself. If he was acting upon the assumption that Kelley was the agent of Skyles, he was charged with ascertaining the scope of the agent's authority; and not having done so, so far as here disclosed, he dealt with Kelley at his peril, and having parted with his money to an agent not authorized to transfer the order to him, he is remediless, as against the principal who was the owner.

As the evidence wholly fails to support the verdict, the judgment and order are reversed, and the cause remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

STATE EX REL. CARLETON, RELATOR, v. DISTRICT COURT
OF LEWIS AND CLARK COUNTY ET AL., RESPONDENTS.

(No. 2,241.)

(Submitted October 10, 1905. Decided October 28, 1905.)

*District Judges—Bias and Prejudice—Affidavit—Motion for
New Trial—Contempt—Certiorari.*

District Judges—Disqualification—Bias and Prejudice—Motion for New
Trial—Contempt.

1. The affidavit imputing bias and prejudice on the part of the district judge, provided for in section 180 of the Code of Civil Procedure, as amended by Act of 1903 (Laws of 1903, 2d Extra. Session, p. 9), may be filed by attorney or client, after a trial has been had and while a motion for a new trial is pending, at any time before the day set for the hearing of such motion; and the filing thereof does not constitute contempt.

Contempt—Certiorari—Time of Application.

2. After an order, adjudging one guilty of contempt and imposing punishment, has been made and entered—the district judge thus finally disposing of the matter—an application to the supreme court for a writ of review is not premature, although execution of the order has been suspended to a day certain to allow relator to attend to business of importance.

APPLICATION by the state, on the relation of E. A. Carleton, for a writ of review to annul an order of Hon. Henry C. Smith, a judge of the district court of Lewis and Clark county, adjudging relator guilty of contempt. Order annulled. Mr. Justice Holloway dissenting.

Mr. William T. Pigott, for Relator.

Mr. Albert J. Galen, Attorney General, and *Mr. W. H. Poorman*, Assistant Attorney General, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Certiorari. This proceeding was instituted to have annulled an order of the district court of Lewis and Clark county adjudging the relator guilty of contempt.

Briefly, it appears from the record that on April 6, 1905, a cause entitled "*Rilla M. Coulter v. Union Laundry Company*," being at issue, was heard before Hon. Henry C. Smith, sitting with a jury, in department 1 of said court. The relator was counsel for plaintiff, and T. J. Walsh, Esq., for defendant. When the plaintiff had submitted her evidence, the court, on motion of counsel for defendant, directed a nonsuit and judgment in favor of defendant. The plaintiff thereupon moved for a new trial, and her statement in support of the motion was settled and signed by the judge, and filed with the clerk on June 29th. The motion was, at the time this proceeding was instituted, still undetermined, nor had a day been fixed for a hearing. On July 17th, the plaintiff, through her counsel, filed with the clerk her affidavit, stating that she believed and had reason to believe, that she could not have a fair and impartial hearing or trial of her motion, by reason of the bias and prejudice of Judge Henry C. Smith, before whom the

cause was pending, and asked that another judge be invited to hear and determine it. On September 26th the relator, as counsel for plaintiff, appeared in court, and, presenting the affidavit with a written stipulation with counsel for defendant that the cause might be transferred to department 2 of the court, because of the disqualification of Judge Smith, moved that the transfer be made. On the following day an order was made, reciting the presentation of the affidavit and stipulation, and denying the motion. On the 29th this order was expunged from the record by direction of the judge, and by another order, as of the 26th, the motion was directed to be submitted for consideration by the court and was taken under advisement. On the same day the relator was called to appear in court, and did so, whereupon the motion was denied, and the relator was adjudged guilty of a contempt committed in the immediate view and presence of the court by the presentation of the affidavit and stipulation. A fine of \$250 was imposed, and the relator ordered into the custody of the sheriff, to stand committed until the fine should be paid, or, in default of payment, that he be imprisoned in the county jail of Lewis and Clark county one day for every \$2 of such fine or any part thereof remaining unpaid. Thereupon this application was made, on the ground that the order was without or in excess of jurisdiction.

It was assumed, during the argument by counsel for both parties, that the filing and presentation to the court of an affidavit imputing bias and prejudice as a disqualification of the judge, and therefore a ground for a change of judge or of the place of trial, is a contempt, in the absence of a statutory provision authorizing it. The correctness of this assumption we shall not undertake to consider or determine. There is authority to support it. (*In re Jones*, 103 Cal. 397, 37 Pac. 385.) For present purposes we shall adopt the assumption and proceed to consider and determine the question presented, to-wit, whether the disqualification of bias and prejudice provided for in section 180 of the Code of Civil Procedure, as amended by the Act of 1903 (Laws 1903, 2d Extra. Session, p. 9), may be

invoked after a trial has been had and while a motion for a new trial is pending.

This provision and section 615 of the same Code, as amended at the same session of the legislature (Laws 1903, 2d Extra. Session, p. 8), have heretofore been considered by this court, both as to their constitutionality and their application to particular cases. (*State ex rel. Anaconda C. M. Co. v. Clancy et al.*, 30 Mont. 529, 77 Pac. 312; *State ex rel. Durand v. District Court et al.*, 30 Mont. 547, 77 Pac. 318; *State ex rel. Boston & Mont. Con. C. & S. M. Co. v. Judges et al.*, 30 Mont. 193, 76 Pac. 10; *State ex rel. Nissler v. Donlan et al.*, 32 Mont. 256, 80 Pac. 244.) In *State ex rel. Anaconda C. M. Co. et al. v. Clancy et al.*, and *State ex rel. Boston & Mont. Con. C. & S. M. Co. v. Judges et al.*, it was held that the two amended sections are companion measures, the latter being intended to render effective the provisions of the former. In the first of these cases it was also held that the legislation is not open to any constitutional objection. *State ex rel. Boston & Mont. Con. C. & S. M. Co. v. Judges et al.* and *State ex rel. Durand v. District Court et al.*, presented the question whether these provisions apply to contempt proceedings. It was held that they have no application. In *State ex rel. Nissler v. Donlan et al.* the conclusion was reached that the Acts may be invoked to disqualify a judge when sitting in probate proceedings. In the latter case the question was whether this legislation applied at all to probate proceedings, counsel for respondents contending that a provision of the Probate Practice Act (Section 2530, Title XII, Chapter III, Article IX, Part III, of the Code of Civil Procedure, as amended by Act of 1897 [Laws 1897, p. 244]), declaring the disqualifications of district judges in these proceedings, is exclusive. As applied to the particular proceeding then before the court, it was held that the provisions could not be invoked because the attempt to disqualify came too late, the court then being engaged in the hearing.

Section 615 provides for a change of the place of trial whenever one or more of the first three grounds enumerated therein

exist. The change must be granted on motion when the presiding judge is disqualified for any of the reasons enumerated in section 180. He must not thereafter sit in the action or proceeding, and, on motion, must grant a change of place of trial, unless the parties agree in writing upon another judge (presumably to be called in by the presiding judge), or upon a member of the bar as judge *pro tempore*, or the presiding judge calls another judge who shall appear and assume jurisdiction of the cause within thirty days. If the conditions of subsection 4 of section 615 are not met by counsel, and the place of trial is changed, it must be done subject to the provisions of section 616.

The word "cases," in section 615, evidently means contingencies, chances, conditions or state of circumstances; in other words, whenever any of the grounds enumerated in that section is made to appear. The phrase "action or proceeding" in section 180, is comprehensive, and includes all proceedings of a civil nature, as well as actions in the stricter sense. (*State ex rel Nissler v. Donlan et al., supra.*)

As defined in the Code of Civil Procedure, the term "action" means a proceeding instituted in a court by one or more parties against another or others to enforce or protect a right, to redress or prevent a wrong, or to punish a public offense. (Sections 3471, 3479.) The Penal Code provides for the prosecution of criminal actions. (Section 3480, Code of Civil Procedure.) They do not enter into this discussion, since the provisions under consideration have no application to them. (*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. Judges et al., supra.*) Further reference to them is therefore omitted. All proceedings to enforce a remedy, not falling technically under the foregoing definition of the term "action," are classed under the head of "special proceedings." (Section 3472, Code of Civil Procedure.) The term "proceeding," as ordinarily used, is generic in meaning and broad enough to include all methods of invoking the action of courts, whether controversies properly termed "actions" or "special proceedings," as distinguished from them. But, in view of the distinction

made by the Code between actions and special proceedings, and its use here in connection with the term "action," the term "proceeding" must be construed, not in this general generic sense, nor as synonymous with the term "action," but as referring to the other proceedings provided for in the Code, to-wit, special proceedings; otherwise, the term "action" could not be assigned any meaning, nor could the term "motion," as used in the expression "action, motion or proceeding" elsewhere in the section.

Furthermore, it is the policy of our system that every litigant, no matter in what form his application may be presented to the court, shall have his rights adjudicated by a judge who is not interested in the result. It cannot be doubted for an instant that it would be perversion of justice for a judge to sit in any proceeding in the event of which he has an interest, whether such interest arise from the fact that he is a party in interest, directly or indirectly, or that he is related to one or more of the parties, or that he has theretofore been an attorney or counselor for one of the parties to the action or proceeding. Nor should he be allowed to sit, when he is laboring under bias or prejudice toward one or more of the parties litigant. By the amendment to section 180, *supra*, the legislature has sought to provide a means by which this latter condition may be avoided. In doing so, it recognized the inherent difficulty of attaining this end, if a judge, possibly already biased or prejudiced, or in any event more or less affected by a feeling of offense arising out of the charge made against him by the litigant, be permitted to sit and try the question whether or not he is in fact biased, and, in its effort to meet a situation surrounded by so much difficulty, enacted the amendment to section 180, *supra*, which makes the imputation sufficient to require a change of judge, or, in default thereof, of the place of trial under section 615. Of the wisdom of its action there may be much doubt or question; but it must not be overlooked that this ground of disqualification stands upon the same level of importance as do the others enumerated, except as to the time when the imputation may be made, and operates just as

effectively, if invoked at the proper time. We apprehend that the other grounds of disqualification may be availed of at any time whenever they become known to the presiding judge or the litigant.

So far, the application of the legislation embodied in the amendment generally to actions and other proceedings is not attended with much difficulty. The difficulty of application arises when we begin to consider the time in the course of the action or proceeding at which the invocation of it may be made. The language of the provision is "at any time before the day appointed or fixed for the hearing or trial" of the particular "action, motion or proceeding." The word "motion" seems to have been inserted purposely, to indicate that it was the intention of the legislature to allow the litigant to work the disqualification at any time before the time for trial on the merits, and, further, at any time before a hearing on a motion in the progress of the case which involves a final adjudication of the rights of the parties upon that particular branch of the case. To illustrate: that it might be filed at any time before the hearing of a demurrer or motion to strike, or motion for judgment on the pleadings, or trial on the merits, or a hearing on motion for a new trial, or a motion to set aside a default, or the like, but not in any of these instances, on the day of the hearing or during its progress. It would seem to follow necessarily that motions made during the progress of any of these hearings are therefore excluded, because a hearing upon the merits, or upon a motion, includes all the motions or other steps which may necessarily be made in order to present the questions involving the rights of the parties during the progress of such hearing. This construction must be given to the fourth subdivision of section 180, or else the term "motion," as used therein, has no significance whatever.

But beyond this we apprehend that it was the purpose of the legislation, as it stood prior to the amendment, to allow litigants the right to move for change of judge or change of place of trial upon the occurrence of a disqualification of the presiding judge for any of the reasons enumerated therein; for it

may happen that a judge who is sitting in the trial of a cause may become disqualified during the progress of the hearing. A marriage might occur between one of the litigants and a relative of the judge, so that the judge would become a kinsman of one of the litigants within the prohibited degree. It is also possible that one of the relatives of the judge within the prohibited degree might become interested in the result of the litigation by purchase of interests of one of the parties. It might also happen that it is brought to the knowledge of the judge, or the parties, that the judge has theretofore been counsel to one of the parties in some branch of the same case, which fact did not theretofore appear. Any of these contingencies would render it improper for the judge to sit in the case, and put it within the power of any one of the litigants to make the disqualification thus wrought appear and disqualify him.

While the disqualification of imputed bias and prejudice may not be invoked during a hearing, because the limitations embodied in the amendment to section 180 render it impossible, yet the disqualification may be worked, as specifically provided, at any time before the day of hearing upon any one of the separate steps to be taken in the progress of the case. This would include, of course, a motion for a new trial. As it would be manifestly improper for a judge, who is shown to be disqualified for any of the first three grounds mentioned in amended section 180, to preside and determine a motion for a new trial, so, for the same reason, if it be made to appear at the proper time that he is disqualified by bias and prejudice to sit at the hearing, he should not be allowed to sit.

In *Finn v. Spagnoli*, 67 Cal. 330, 7 Pac. 746, the plaintiff, after notice of intention to move for a new trial had been served and filed by the defendant and the statement of the case had been prepared and served upon the plaintiff and the plaintiff had likewise served his amendments, moved that the cause be transferred to the superior court of an adjoining county upon the ground that the judge was disqualified from further acting in the case. The facts were that the attorney who had tried the case for the defendant had in the meantime

become the presiding judge, and another judge from a county not adjoining the county in which court was being held was called in his stead. The motion was denied. Upon appeal from the order the supreme court reversed it, and held that the cause should have been transferred under the provisions of section 398 of the Code of Civil Procedure of California, of which section 616, above cited, is a copy. It was further held, the court quoting from the earlier case of *Tregambo v. Comanche M. & M. Co.*, 57 Cal. 501, that: "A trial is the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause for the purpose of determining such issue. When a court hears and determines any issue of fact or of law for the purpose of determining the rights of the parties, it may be considered a trial." This was stated as the conclusion of the court in answer to the contention of counsel that a trial of the cause had been had, and that it could not be transferred for a trial of the motion.

This court, in *State ex rel. Montana Central Ry. Co. v. District Court*, 32 Mont. 37, 79 Pac. 546, in considering the meaning of the expression "at any time before trial," as used in section 1004 of the Code of Civil Procedure, cites, among other cases, *Tregambo v. Comanche M. & M. Co.*, *supra*, and approves the definition of the word "trial" adopted by the supreme court of California. It also cites and approves the later case of *Goldtree v. Spreckels*, 135 Cal. 666, 67 Pac. 1091, to the same point; and, while the term, as defined by our own court and in *Tregambo v. Comanche M. & M. Co.* and *Goldtree v. Spreckels*, was used in other connections than that in which it is found in the statute now under consideration, in *Finn v. Spagnoli*, *supra*, it was applied to a hearing on a motion for a new trial, and there is no apparent reason why the same definition should not be adopted for the term as used in the statutes.

But, independently of these decisions, we are of the opinion that a motion for a new trial is *pro hac vice* a proceeding independent of the trial of the case on the merits, and that un-

der a proper construction of the expression "action, motion or proceeding," as used in section 180, an application for a change of judge or change of place of trial, on any of the grounds mentioned in that section, ought to be entertained and granted, if coming within the statute. Of course, the latter part of section 180, limiting the number of disqualifications upon the ground of bias and prejudice, must be construed to mean the number of disqualifications that may be had during the controversy on the ground of bias and prejudice at any stage of it, because a change of place of trial or a change of judge upon a motion transfers the action just the same as a change of judge or a change of a place of trial upon the trial or hearing of the cause or proceeding on the merits transfers the cause, and, no matter at what stage of it the transfer is made, the particular transfer must be counted as one of the five permitted to each party by the statute. Though the construction of the legislation is attended with difficulty, when it comes to an application of it to specific cases, we think this is the only proper construction.

Counsel for respondents contended that the application to this court was premature; the ground of his contention being that the record shows that execution of the order had been suspended to a day certain to allow the relator to attend to a matter of business of importance. The order was made and entered, and, so far as the record shows, the matter then before the court had been finally disposed of. Application for review was proper at any time after this was done, whether the order was in progress of execution or not.

Counsel also cites a remark in *State ex rel. Anaconda C. M. Co. v. Clancy et al.*, *supra*: "It would be absurd to speak of a change of venue, or change of place of trial, after a trial has been had, and while a motion for a new trial, for instance, is pending," and insists that this court has already decided that a motion for a new trial does not fall within the purview of these provisions. The remark does indicate that, at the time that opinion was written, this court entertained the view that the term "trial" should not be given a meaning broad enough

to include a hearing on a motion for a new trial. Yet the language was used in the course of the discussion by way of illustration, and is not germane to the question then before the court for decision. After a further consideration of the legislation we are of the opinion that the remark of the court by way of an *obiter* was not justified, and that the purpose of the legislation was, as now stated, to include a trial of any question arising on motion at any stage of an action or proceeding, not during a hearing on the merits, the result of which is a determination of the rights of the parties as then presented.

The result is that the relator had a right to file the affidavit of disqualification on the motion for a new trial in the case of *Coulter v. Union Laundry Company*, and that it was not a contempt for him or his client to do so. If it was not a contempt, the judge was compelled to grant the change of judge or change of the place of trial, under the clear injunction of the statute. The court, therefore, was without jurisdiction to punish the relator as for a contempt, and the order complained of must be annulled.

Annulled.

MR. JUSTICE MILBURN concurs.

MR. JUSTICE HOLLOWAY: I dissent. Any attempt to give meaning to the so-called fair trial law is fraught with the greatest difficulty. The apparent effort of the legislature was to provide a method for disqualifying a trial judge by the mere imputation of bias or prejudice, and to provide for a change of venue as a final resort in every case where such affidavit of bias or prejudice is filed. This much is reasonably clear. But when—at what stage in the course of the litigation—may the disqualifying affidavit be filed? If it can be filed after trial on the merits and while a motion for a new trial is pending, then a change of venue may be had at that stage of the proceeding; and, conversely, if a change of venue may be had after trial upon the merits and while a motion for a new trial is pending undetermined, then a disqualifying affidavit may then be filed.

Section 180 of the Code of Civil Procedure, as amended by an Act of the Second Extraordinary Session of the Eighth Legislative Assembly, approved December 10, 1903 (Laws 1903, 2d Extra. Session, p. 9), provides that the disqualifying affidavit "may be made by any party to an action, motion or proceeding * * * at any time before the day appointed or fixed for the hearing or trial of any such action, motion or proceeding. * * *" I agree with the majority of the court in saying that the term "proceeding" used in that section means special proceeding, for the generic term "proceeding" includes every application to a court for a judicial remedy, and every such remedy is to be had through the agency of an action or special proceeding. (Sections 3469, 3470, 3472, Code of Civil Procedure.) These provisions of the statute are exclusive, and therefore the term "motion" could not have been used to define an application to a court independently of an action or a special proceeding. So that, if it has any meaning at all, as used in that section, it must be the meaning given the term by section 1820 of the Code of Civil Procedure: "An application for an order is a motion." The Code does not attempt to make any classification of motions. They are all of equal dignity, and, if the meaning given to the term as defined in section 1820 above was meant to attach to it as used in section 180 as amended, then upon any motion which may properly be made at any stage of an action or proceeding, a party litigant may be heard to impute bias or prejudice to the presiding judge, with no limitation whatever, except that his disqualifying affidavit shall be filed prior to the day set for hearing the motion. I do not believe that the term "motion" was used with any well-defined idea of its meaning, or that it has any meaning whatever as employed in section 180 above, as amended. I am led to this conclusion by these considerations:

1. The so-called "Fair Trial Law" assumes to amend section 180 of the Code of Civil Procedure, and as amended that section now reads: "Any justice, judge or justice of the peace must not sit or act as such in *any action or proceeding*: (1)

* * * (2) * * * (3) * * * (4) When either party makes and files an affidavit," etc. The limitation here imposed is that the district judge shall not sit or act as such judge in any action or proceeding wherein he is disqualified upon any of the grounds enumerated in the four subdivisions following. Furthermore, in the remaining portion of the section as amended, all reference to the term "motion" is omitted, as it is in the first part of the section quoted.

As further evidence of the meaningless way in which the legislature used the term "motion," it is to be observed that the same session of the legislature added to Title IV, Part II, of the same Code, two sections to be numbered 620 and 621, by which it is attempted to provide for certain costs in the event a disqualifying affidavit should be filed, and by section 621 provision is made that certain additional costs shall be certified by the clerk of the court to which the cause was transferred, "to the board of county commissioners of the county in which said action, motion or proceeding was commenced," etc. It is not difficult to understand what is meant by the commencement of an action or the commencement of a special proceeding, but the commencement of a motion is a curiosity in the law.

2. That a change of venue cannot be had after a trial on the merits and while a motion for a new trial is pending, and, consequently that a disqualifying affidavit cannot be filed at that stage of the proceeding, seems to me beyond controversy. Section 1170 of the Code of Civil Procedure defines a new trial as the re-examination of an issue of fact in the same court, after a trial or decision by a jury or court, or by referees. The elements of this definition are, first, a re-examination of an issue of fact; second, the retrial or re-examination must be *by the same court* which tried the case originally; and, third, the re-examination can only be had after a trial and decision by a jury, court, or referee.

To make a concrete application of the provisions of section 1170 to the matter now before us, it is sufficient to say that the

case of *Coulter v. Union Laundry Company* was tried in the district court of Lewis and Clark county, which comprises the first judicial district of this state. The statement on motion for new trial was settled by that court. If the disqualifying affidavit could then be filed, pending a determination of the motion for a new trial, a change of venue could also be had at that stage, and, if granted and the action transferred to the district court of Jefferson County, for instance, which is in the fifth judicial district, then another court, and not *the same court*, would pass upon the motion, and, if no further disqualifying affidavits were filed, that court would proceed to try and re-examine the cause, if the motion was granted, and this would constitute as palpable a violation of the express language, as well as the spirit, of section 1170 above, as I can imagine. That this result follows is inevitable.

If Judge Smith was the only judge in the first judicial district, and he had failed to call in another judge after the disqualifying affidavit was filed—if it can be filed at such stage of the proceedings—or had called in one who had failed to appear, and if the parties had failed to agree upon a district judge or a judge *pro tempore* to try the cause, then either party would have been entitled to a change of venue under the provisions of section 615 above, as amended. The mere fact that in this particular instance the parties did agree upon a district judge to hear the motion for new trial and retry the cause, if the motion was granted, argues nothing; for they might not have agreed, and whatever rule is adopted must be a general one and of universal application. I am, therefore, clearly of the opinion that a change of venue can never be had at any stage in the course of a judicial inquiry after a trial on the merits and pending the determination of a motion for a new trial (*Swineford v. Pomeroy*, 16 Wis. 575; *Cairns et al. v. O'Brien et al.*, 40 Wis. 469; *Ex parte Cox*, 10 Mo. 742; *Crane v. Crane et al.*, 81 Ill. 165); and therefore that a disqualifying affidavit cannot be filed after that period has been reached.

When the legislature, in amending section 180 above, provided that a disqualifying affidavit may be filed at any time before the time appointed or fixed for the hearing or trial, it meant a trial on the merits, and nothing else. While the expression quoted in the opinion of the majority from *State ex rel. Anaconda Copper M. Co. v. Clancy* was made use of by way of illustration, I am satisfied that it correctly states the law.

Neither do I think that the decision of this court in *State ex rel. Montana Central Ry. Co. v. District Court*, referred to in the majority opinion, has any decisive or persuasive effect here. There we were considering the meaning of the expression "before trial." In this instance we are considering the legal effect of a hearing upon, and disposition of, a motion for new trial, which, in my opinion, do not in any sense come within the meaning of the term "trial" as there defined. The provisions of the Iowa Code are not more emphatic in their terms than are our own in section 1170 above. Section 3154 of the Iowa Code (1873) provides, among other things: "The district or circuit court in which a judgment has been rendered, or by which, or by the judge of which, a final order has been made, shall have power after the term at which such judgment or order was made to vacate or modify such judgment or order. * * *" Construing this section the supreme court of Iowa, in *Gilman, Admr., v. Donovan*, 59 Iowa, 76, 12 N. W. 779, said: "It will be observed that the proceedings authorized under the statute are in the nature of a writ of error *coram nobis*, and are provided for the review of a case after final judgment in the very court wherein it was rendered. By the express terms of the statute quoted, jurisdiction of this proceeding is conferred upon the court wherein the judgment was rendered; all other courts by these terms are excluded. *Expressio unius est exclusio alterius*. The proceeding is not in the nature of a new or independent action, but is supplementary, and intended to correct errors committed in the trial of a cause and the rendition of a judgment. It is of the same character as all proceedings for new trials, the correction of

records, etc., wherein the court committing the errors corrects them. In this proceeding the law requires the very court rendering judgment to review its decision; the case cannot, therefore, be transferred to another court for that purpose."

I am not unmindful of the fact that the opinion of the majority of the court is supported by the decision of the supreme court of California; but *Finn v. Spagnoli* stands alone, so far as I am able to ascertain, in holding that a change of venue may be had while a motion for a new trial is pending, and that case was decided apparently without any reference whatever to section 656 of the California Code of Civil Procedure, which is identical with our section 1170 above, and, in my opinion, the decision cannot be reconciled with the provisions of that section. Section 398 of the California Code of Civil Procedure, which corresponds with our section 616, Code of Civil Procedure, cannot possibly be made to refer to the hearing of a motion for new trial without absolutely abrogating the provisions of section 656 above of their Code.

In *Perkins v. Jones & League*, 55 Iowa, 211, 7 N. W. 599, the question upon which a determination of this case depends was before that court, and considering the merits of the controversy, as well as the application of the term "trial" to the hearing of a motion for a new trial, that court said: "The sole question involved is whether after verdict, and whilst a motion for a new trial is pending, a change of venue may be awarded to another court. We are clearly of the opinion that such change cannot be granted. There are many reasons against granting a change at such stage of the proceedings. Section 2590 of the Code provides that a change of the place of trial may be had. Section 2739 of the Code provides that a trial is a judicial examination of the issues in an action, whether they be issues of law or of fact. Now, it cannot be claimed that the passing upon a motion for a new trial is the examination of an issue of fact or of law in the case. It is no more than a review of the question whether the issues of law or of fact have already been properly determined, or whether they shall again be submitted to adjudication. Section

2838 of the Code provides that the application for a new trial must be by motion. The very name *motion for a new trial*, suggests that the passing upon the motion is not a trial, but simply a determination whether any further trial shall be allowed." The decision in this case was approved in *Bennett v. Carey*, 57 Iowa, 221, 10 N. W. 634, and in *Gilman, Admr., v. Donovan*, above.

In my opinion the decision in *Finn v. Spagnoli*, is not supported by reason, and cannot be reconciled with the provisions of the California Code, not referred to in the opinion. On the other hand, the Iowa cases here cited seem to be supported by reason, and to offer the only possible solution of the question here presented which can be had without absolutely abrogating the provisions of our section 1170 above. In the absence of anything to indicate it, I am unwilling to concede that repeal or amendment of section 1170, by implication, was effected by the enactment of the amendments to section 180 or section 615 above.

Some analogy is sought to be drawn between the disqualification for bias and prejudice and the other grounds mentioned in the first three subdivisions of section 180; but in the majority opinion it is conceded that the disqualification for bias or prejudice may not be effected during the progress of the trial of an action on the merits, only for the reason that in that particular instance the statute forbids it. But, if the conclusion reached by the majority is correct, then, if during the actual trial of a cause upon the merits, and while testimony is being received, a brother of the judge purchases an interest in the property in controversy, the other party can at that stage of the case move for a change of venue upon the ground that the district judge is disqualified, being related to a party litigant within the prohibited degree; for there is not any limitation within which the disqualifications mentioned in the first three subdivisions of section 180 above must be made to appear, while section 615, as amended, applies to them, as well as to subdivision 4 of section 180. It is true that a judge who was not disqualified at the time of the commencement of the trial

may become disqualified during its progress and before the motion for a new trial is disposed of; but this emergency is to be met and this difficulty disposed of by the application of a remedy other than a change of venue. Section 12, Article VIII, of the Constitution, provides, among other things: "Any judge of the district court may hold court for any other district judge, and shall do so when required by law." The substance of this section is enacted in section 36 of the Code of Civil Procedure, which also provides that upon request of the governor, it shall be the duty of a district judge to hold court for another district judge. And in these provisions must be found the remedy for such an extreme case as just suggested.

I am therefore of the opinion that a change of venue could not have been had in *Coulter v. Union Laundry Company* while the motion for a new trial was pending, and therefore that this relator had no right to file or present an affidavit of bias or prejudice after the cause had been tried and while a motion for a new trial was pending undetermined, and, assuming, as counsel for both parties did on the hearing, that the presentation of such an affidavit, when not authorized by law, constitutes contempt, the district court had jurisdiction to punish the relator for such contempt, and *certiorari* will not lie. For these reasons, I am unable to agree with the conclusion reached by the majority of the court.

CHAN, RESPONDENT, v. SLATER, SHERIFF, APPELLANT.

(No. 2,167.)

(Submitted October 7, 1905. Decided October 28, 1905.)

Claim and Delivery—Pleadings—Complaint—Evidence—Declarations—Husband and Wife—Separate Property and Earnings of Wife—Liability for Husband's Debts—Instructions.

Claim and Delivery—Pleadings—Complaint.

1. A complaint in claim and delivery, filed on April 16, 1903, and alleging that on March 21, 1903, plaintiff was the owner of the property, and that on that day it was taken from her possession wrongfully and without her consent, by defendant sheriff, is defective, in that it fails to show that plaintiff was the owner or had any right to the possession of the property *at the time the action was commenced*, and subsequent allegations that she demanded the possession of the property and that defendant still unlawfully withholds and detains it do not by implication supply the omission of the substantive allegation necessary to show the right to recover.

Claim and Delivery—Instructions.

2. In an action in claim and delivery, the court charged that plaintiff, in order to recover, must show by a preponderance of the evidence that she was the owner of the property, and further charged that defendant sheriff was entitled to a verdict if the jury believed, "from a preponderance of all the evidence," that plaintiff's husband, under an attachment against whom the property was taken by defendant, was the owner of the property. *Held*, that the latter instruction was misleading, in the absence of any charge that defendant would be entitled to recover if the evidence did not preponderate on either side.

Claim and Delivery—Instructions.

3. A charge, in an action in claim and delivery, that plaintiff must establish her title to the property by a "clear" preponderance of the evidence is technically erroneous, as a bare preponderance of the evidence would be sufficient.

Claim and Delivery—Evidence—Declarations.

4. In an action in claim and delivery, evidence of declarations made by plaintiff's husband, while apparently in exclusive possession and control of the property in controversy and under an attachment against whom the property was taken by defendant sheriff, that he was the owner of it, was admissible, as a part of the *res gestae*, to characterize the possession.

Claim and Delivery—Evidence—Declarations.

5. In claim and delivery, on the issue of whether a wife's title to property was merely colorable, and was held by her solely to shield such property from her husband's creditors, declarations of the husband, made by him while in exclusive possession and control of the property, that he was the owner thereof, were admissible, not as absolutely binding upon her, but as substantive evidence reflecting upon the *bona fides* of her claim.

Evidence—Restriction to Special Purpose.

6. The fact that evidence was admitted without objection did not render erroneous the action of the court in limiting its scope and effect to a particular purpose for which alone it was competent.

Husband and Wife—Separate Property of Wife—Inventory.

7. *Held*, that the inventory of the wife's separate property, provided for in sections 221 and 222 of the Civil Code, is necessary to protect such property only when it is in the husband's exclusive possession, and third persons deal with him on the credit of it without knowledge of the wife's claim.

Husband and Wife—Earnings of Wife—Inventory.

8. *Obiter*: The earnings and accumulations of the wife, made after marriage, are not protected from seizure, where the husband is al-

lowed to assume exclusive possession of them, unless the inventory provided for in sections 221 and 222 of the Civil Code has been filed.
Husband and Wife—Separate Property of Wife—Liability for Husband's Debts.

9. Property acquired by the wife, subsequent to the contracting of a debt by the husband cannot be held liable for such debt.

Claim and Delivery—Instructions—Immaterial Issues.

10. Where, in an action in claim and delivery, the only issue was whether or not plaintiff's claim to the property was colorable only, and title assumed for the purpose of protecting the same against the claims of her husband's creditors, instructions in the language of sections 220, 222, and the latter part of section 227 of the Civil Code, relative to the separate property of the wife and its liability for the husband's debts, were on an immaterial issue and should not have been given.

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

ACTION by Katerina Chan against L. P. Slater, as sheriff of Fergus county. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Mr. Rudolph Von Tobel, and Mr. O. W. Belden, for Respondent.

Messrs. Blackford & Blackford, for Appellant.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action in claim and delivery. The complaint alleges, in substance, that the defendant is, and at all times mentioned therein was, the sheriff of Fergus county, Montana; that on March 21, 1903, the plaintiff was the owner of certain personal property, consisting of grain, cattle, and hogs, of the value of \$750; that the defendant on March 21, 1903, without the plaintiff's consent, wrongfully took said property from her possession; that before the commencement of the action, and on March 26th, the plaintiff demanded of defendant possession of said property; and that defendant still unlawfully withholds and detains the same from plaintiff, to her damage in the sum of \$250. Judgment is demanded for a return of the property, or for \$750, the value thereof, in case return

cannot be had, and for \$250 damages. The complaint was filed on April 16, 1903. A general and special demurrer having been overruled, the defendant answered, putting in issue the title of plaintiff, and, by way of affirmative defense, alleging that the owner of the property is one Jacob W. Chan, the husband of the plaintiff, and justifying the taking under an attachment issued out of the district court in and for Fergus county in an action wherein the Northwest Thresher Company was plaintiff and said Jacob W. Chan was defendant. The plaintiff had a verdict and judgment. Defendant has appealed from the judgment and an order denying him a new trial.

The validity of the judgment is challenged on the grounds, first, that the court erred in overruling the demurrer, for that the complaint does not state a cause of action; second, that it erred in submitting certain instructions to the jury and refusing to submit certain others requested by defendant; and, third, that the evidence is insufficient to sustain the verdict.

1. The criticism made of the complaint is that it does not allege any right to the possession of the property at the commencement of the action. We think this is a just criticism. The action was commenced by the filing of the complaint on April 16, 1903. The allegation is that on March 21, 1903, the plaintiff was the owner of the property, and that on that day it was taken from her possession wrongfully, and without her consent. From this allegation it does not appear that at the time the action was commenced, nearly a month later than this date, she was still the owner, or that she had any right to the possession. "It is well settled that, to maintain an action in claim and delivery, plaintiff must plead and prove his right to the immediate possession of the property at the time of the commencement of his suit." (*Cameron v. Wentworth*, 23 Mont. 70, 57 Pac. 648.) The subsequent allegations that she made demand upon the defendant for its possession, and that the defendant still unlawfully withholds and detains it, do not by implication supply the omission of the substantive allegation necessary to show the right to recover. (*Fredericks v.*

Tracy, 98 Cal. 658, 33 Pac. 750; *Truman v. Young*, 121 Cal. 490, 53 Pac. 1073; *Simonds v. Wrightman*, 36 Or. 120, 58 Pac. 1100.)

2. The court, in the eighth and ninth paragraphs of its charge, instructed the jury as follows: "If you believe that the plaintiff was the owner of the said goods and chattels as alleged, and that she did not consent to the taking of the said goods, then it is your duty to find for the plaintiff, except as elsewhere explained. If, on the other hand, you believe, from a preponderance of all the evidence in the case, that her husband, the said Jacob W. Chan, was the owner of the said goods and chattels at the time and place alleged in the pleadings in this case, then it is your duty to find for the defendant." (Instruction No. 8.)

"If you believe, from the preponderance of all the evidence in the case, that the said Jacob W. Chan was the owner of any portion of the said goods and chattels, then it is your duty to find for the defendant as to such portion of the goods and chattels." (Instruction No. 9.)

The court, also, on the same subject submitted instruction numbered 27, as follows: "You are further instructed that the proof on the part of the plaintiff in this case must be clearly established by a preponderance of the evidence that the property is hers, and that she is not simply a holder of the title for her husband's benefit. If this is not made to appear by such preponderance of the evidence, the legal presumption is that the money was furnished by the husband. The burden of establishing her separate estate is upon the plaintiff in this case to prove clearly by a preponderance of the evidence that she paid for or acquired the property with funds which were not furnished by the husband, unless such funds, if any, were a gift by the husband to her."

It was said in *Kipp v. Silverman et al.*, 25 Mont. 296, 64 Pac. 884: "In cases of this character, the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of that of his adversary. Therefore the obliga-

tion rests upon him to sustain this burden by a preponderance of the evidence; that is, he must show by a preponderance of the evidence that he has a right superior to that of the defendant, and that the value of the property, or the interest therein in question, is greater than that admitted by the defendant.

* * * The defendants were not under the obligation to produce any evidence until plaintiff had made out a *prima facie* case, and then to go no further than to produce sufficient evidence to show an equipoise. The burden, therefore, rested upon the plaintiff throughout."

The court had already instructed the jury correctly, in paragraph 7 of the charge, that the plaintiff, in order to recover, must show by a preponderance of the evidence that she was the owner of the property as alleged in the complaint. So instruction numbered 27 cast the burden upon the plaintiff to establish by a clear preponderance of the evidence that the property was hers as alleged. In instructions numbered 8 and 9, however, the court told the jury that if they believed, from a preponderance of all the evidence in the case, that the husband, Jacob W. Chan, was the owner of the property or any part thereof, defendant was entitled to a verdict for the property, or so much of it as appeared to belong to him. While instructions 8 and 9 are correct as abstract propositions of law, for the defendant was entitled to a verdict, if he showed by a preponderance of the evidence that Chan was the owner of the property, nevertheless they are misleading, in that the jury, in the absence of a proper instruction as to what they should find in case of an equipoise in the evidence, were probably led to believe that the defendant could not recover, except by establishing his right by a preponderance of the evidence, whereas he would be entitled to recover if the evidence did not preponderate on either side.

With reference to instruction No. 27, it may be remarked that it cast a greater burden upon the plaintiff than the law requires; for under it the right of the plaintiff must be clearly established by a preponderance of the evidence, whereas a

bare preponderance is sufficient. In this important particular the instruction is not technically correct. The qualifying word "clear" should have been omitted. The defendant stands in no attitude to make complaint; but, as a new trial must be ordered, we call attention to it, so that the court may not fall into the same error again.

The controversy in the evidence was as to whether the property belonged to the plaintiff or to her husband, Jacob W. Chan, and chiefly, as to whether, though the title to the land upon which the grain was produced stood in the name of the wife, it had not in fact been purchased by money furnished by the husband. The defendant introduced evidence tending to show this, and also that the money thus furnished had been derived from a sale of lands owned by the husband in Minnesota at the time he obtained credit from the Northwest Thresher Company, and in reliance upon which by the company, in good faith, such credit had been extended to him. The evidence also tended to show that though Chan and his family, including his wife, were living upon the land, he was apparently in exclusive control, not only of it, but also of all the personal property on it. Evidence was introduced without objection by defendant, tending to show that Chan, at various times while living on the land with his wife, and apparently in exclusive possession and control of the property in controversy, made statements and representations that he was the owner of it.

Chan had testified for plaintiff, to the effect that the land and all the personal property thereon belonged to her. In this connection the jury were instructed, in substance, that testimony had been introduced tending to show that Chan had made such declarations, but that it had been introduced for impeachment; and that, though the jury were satisfied that he had made such declarations, they were not to be considered as binding upon the plaintiff, unless she ratified or assented to them. In another place in the charge, the jury were further told that it must appear from a preponderance of the

evidence that the plaintiff was present when the declarations were made, or was informed of them and thereupon ratified them; otherwise she should not be held bound by them. Contention is made that the court erred prejudicially in thus limiting the scope and effect of the evidence, first, because, it having been admitted without objection, it should have been considered for all purposes, though strictly competent for one purpose only; and, second, on the theory that it was competent, independently of any knowledge of the plaintiff, as tending to characterize the husband's possession, and therefore as substantive evidence on the question of title. The question of fraud was presented in the case, and any evidence was competent on this issue tending to show that plaintiff's title to the land, and therefore its products, and also to the other personal property, was merely colorable, and vested in her for the purpose of shielding it from her husband's creditors under the pretense that it was derived by purchase from proceeds of her separate estate.

The question of the admissibility of such declarations often arises upon an investigation of title alleged to have been acquired by adverse possession; or, again, where the question is under whom a tenant in possession holds; or, perhaps, more frequently, when the inquiry is as to the *bona fides* of an alleged sale or transfer, as between an attaching creditor and an alleged vendee of the debtor. It is a general rule that the declarations of the vendor, after he has parted with the title and possession, may not be admitted to disparage the title of the vendee, except to show the vendor's intent, where it is a material fact, and for impeachment, where, upon an inquiry touching the *bona fides* of the transfer, the vendor is called by the vendee to testify in his behalf. It is also a general rule that where the vendor has been allowed to retain possession after the transfer, and the nature of his possession becomes a material subject of inquiry, his acts and declarations accompanying and characterizing his possession are admissible, generally, as a part of the *res gestae*. (*Gallick v. Bordeaux et al.*, 22 Mont. 470, 56 Pac. 961.) This is upon the theory

that the fact that the vendee has allowed the vendor to remain in possession is a badge of fraud, and it follows logically that any acts or declarations of the vendor, while thus in possession, tending to characterize such possession, are also admissible as affecting the presumption of ownership. For a discussion of the various theories upon which such evidence is admissible, see 2 Wigmore on Evidence, 1086, and 3 Wigmore on Evidence, 1779.

Whatever may be the ground upon which such evidence is declared to be admissible, it is now a wellnigh universal rule that it is admissible as a part of the *res gestae* to characterize the possession. We can see no reason why, under the facts presented in the present case, a distinction should be drawn between it and a case where the controversy is between an attaching creditor and a vendee. Here there is evidence tending to show that the title to all the property in controversy was derived directly from the husband, and from which an inference may be drawn that the claim of the wife is merely colorable, in order to shield the property from the husband's creditors. The two cases are not distinguishable in principle, and whatever would tend to shed light upon the *bona fides* of the transaction involved in the one case, would seem to be as efficient for the same purpose in the other. The fact that the evidence was admitted without objection would not render erroneous the action of the court in limiting its scope and effect to a particular purpose, if it was competent for that purpose only; but the limitations imposed by the court in this case were too narrow. The evidence should have gone to the jury, with all the other facts and circumstances appearing in the case, not as absolutely binding on the plaintiff, but, strengthened in weight by any acquiescence on her part in her husband's representations, as substantive evidence reflecting upon the *bona fides* of her claim.

Complaint is made that the court did not properly instruct the jury touching the separate property of married women, and under what circumstances it is exempt from liability for

the husband's debts. What constitutes the separate property of the wife is defined by the provisions of Chapter III, Title I, Part III, Division I, of the Civil Code, as follows:

"Sec. 220. All the property of the wife owned before marriage and that acquired afterward is her separate property. The wife may, without the consent of her husband, convey her separate property or execute a power of attorney for the conveyance thereof."

"Sec. 223. The earnings and accumulations of the wife are not liable for the debts of her husband.

"Sec. 224. The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife.

"Sec. 225. All work and labor performed by a married woman for a person other than her husband and children shall, unless there is a written agreement on her part to the contrary, be presumed to be performed on her separate account."

Under these provisions, all the property of the wife, however acquired, either before or after marriage, constitutes her separate estate. This characteristic extends to her earnings and accumulations after marriage, while living with her husband, to those of herself and minor children in her custody while living apart from him, and to the result of her personal services rendered to others than her husband and children, unless there be an agreement in writing by her to the contrary. These provisions are clear and explicit. There are certain conditions, however, with which she must comply to protect her property from the creditors of her husband under all circumstances. Sections 221 and 222 provide for the filing by her with the county clerk of the county of the residence of herself and husband of an inventory, which, when filed, is notice to the world and *prima facie* evidence of her title. This exempts it from liability for debts of her husband, except for necessary articles for the use and benefit of herself

and children under eighteen years of age. (Section 227.) Further, under the latter part of this section, whether this inventory be filed or not, her property, with the exception mentioned in the first part thereof, is not liable to be seized at the instance of creditors of her husband, unless it be found in the sole and exclusive possession of the husband, and then only at the instance of such creditors as have dealt with the husband in good faith on the credit of the property without knowledge or notice that it belongs to the wife.

The legitimate conclusion from an analysis of sections 221, 222, and 227, therefore, is that the inventory provided for in sections 221 and 222 is necessary to protect the property only when it is in the husband's exclusive possession, and third persons deal with him on the credit of it without knowledge of the wife's claim.

In this connection the court submitted to the jury, as a part of its charge, sections 220 and 223, and the latter part of section 227, *supra*. The particular criticism made is that, under a proper construction of sections 223 and 224, the earnings and accumulations of the wife, while living separate from her husband, are exempt, but, while living with her husband, are not exempt, unless protected by the inventory provided for in sections 221 and 222, and therefore that the court was in error in submitting section 223 as a part of its charge without modification, and without further reference to section 227; since, though it might appear from the evidence that the property acquired by the wife from her own earnings and accumulations was in the exclusive possession of the husband, still it would not be liable for its debts. We are inclined to the view that, while section 223 declares the earnings and accumulations of the wife not liable for the husband's debts, this declaration is made subject to the conditions prescribed in section 227, and that her accumulations after marriage are not protected, when the husband is allowed to assume exclusive possession of them, unless the inventory provided for has been filed. Under the facts in this record, however, we think the only material ques-

tion presented was whether the property in controversy belongs to the plaintiff, or whether her claim is fraudulent.

The debts sought to be collected by the Northwest Thresher Company were contracted in Minnesota, where the plaintiff and her husband resided, on August 8, 1899. It does not appear that the plaintiff at that time was the owner, or claimed to be the owner, of any separate property whatever. Indeed, the contrary appears to be the fact. If such were the fact, and assuming the law of that state to be the same as that of this state, there was no property of the wife to which liability could attach. Her acquisitions, whatever they are, have been made since that time; and, since accommodation could not have been extended to her husband upon the credit of property then owned by her, such as she has acquired since that time cannot, under the construction given to the statute *supra*, be liable for debts contracted at that time. Under this view of the case, and it seems to be the only proper view, the only issue before the court was, as we have stated, whether the claim of the wife is colorable only, and the title assumed for the purpose of protecting her husband's property against the just claims of his creditors. The instructions complained of, whether too broad and misleading or not, were upon an issue not involved in the case, and were therefore immaterial. They may have misled the jury, and should not have been submitted.

It is not necessary to refer to the instructions further, since the foregoing comments upon these statutes, and their application to the facts as presented in this record, dispose of all the questions arising upon the instructions connected with this feature of the case. The cases of *Griswold v. Boley et al.*, 1 Mont. 545, *Boley v. Griswold*, 2 Mont. 447, *Palmer v. Murray*, 8 Mont. 174, 19 Pac. 553, and other cases cited by counsel, have no application, since they involved a construction of statutes different in their provisions from those of our present Code.

3. Since the case must be tried again, we do not deem it necessary to enter into a discussion of the question as to

whether or not the evidence is sufficient to sustain the verdict further than to say that upon the issue of fraud we are satisfied it was sufficient to go to the jury.

For the reasons stated, the judgment and order denying a new trial are reversed, and the cause remanded for further proceedings.

Reversed and remanded.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

UNION BANK AND TRUST COMPANY, EXECUTOR, APPELLANT, v. KNOBB, RESPONDENT.

(No. 2,153.)

(Submitted October 3, 1905. Decided November 6, 1905.)

Accounting—Appeal—Findings—Conclusiveness.

1. Where it appeared, in an action for an accounting, that the parties had invested their funds jointly in a common business during a period of over twenty years, without any definite plan or arrangement, without any accounting made or demanded on either side, for many years, and with never a settlement, the district court thus being able to do no more than make a reasonably fair estimate as to the amount due from one party to the other, its findings will not be disturbed, since it is impossible to say from the showing made that the preponderance of the evidence is against them or any of them.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Henry Knobb (Union Bank and Trust Company, executor, substituted) against Eli Knobb. From the judgment rendered, and from an order denying a new trial, plaintiff appeals. Affirmed.

Mr. M. S. Gunn, and Mr. H. J. Burleigh, for Appellant.

Mr. C. B. Nolan, for Respondent.

MR. JUSTICE MILBURN delivered the opinion of the court.

The plaintiff in the court below, Henry Knobb, sued the defendant, praying that an alleged partnership between the parties be dissolved, that a receiver be appointed, and that an accounting be taken of the partnership dealings and the property divided. He alleged that from 1878 up to the time of the commencement of the action, in 1901, he and the defendant, his brother, had an agreement whereby each should contribute money to a general fund, and engage in the business of loaning and investing it, each to share equally in the profits and losses of the business; that each did contribute, and that the defendant has from time to time applied to his own use large sums of the partnership money, how much plaintiff was unable to state, but that it amounted to many thousands of dollars, and largely in excess of the proportion to which defendant was entitled; that defendant had the exclusive management and control of the business, and kept the accounts, and frequently refused to make or render any accounting; and that he has continued to collect money belonging to the partnership, and still refuses to make any report. Defendant denied the allegations of the complaint, so far as they tend to charge him with any sum due the plaintiff, but, on the other hand, averred that the plaintiff would be justly indebted to him, defendant, in the sum of \$5,000, if it were not for a settlement to which he had consented theretofore. He also demanded that an accounting be taken, and that he have judgment against plaintiff for such sum as might be found due him. There are other allegations in the pleadings, but it is not necessary to state them.

The case was tried and submitted upon the theory that there was in fact a partnership, and the court so held. The court further found that the parties were equal partners, and that there was nothing due to either from the other; that the partnership property all consisted of real estate, in which each had an equal interest, and decreed that the partnership be dissolved. It also found that the property of the partnership had already been divided between the parties, and that there was

nothing further to be done in the premises. The court further ordered that each party pay his own costs. In other words, the court dissolved the partnership and left the parties as it found them.

Plaintiff, Henry Knobb, died after the commencement of the action, and his executor appeals from the judgment and an order denying him a new trial, claiming that there is a large sum of money still due the estate of the decedent from the defendant.

It seems that for a period of about twenty-three years the two brothers had business together. Whether it was that of a partnership in law it is not necessary for us to inquire, as the plaintiff declared that it was, and the court so found, and defendant is not complaining on appeal.

Numerous alleged errors of the court are specified by the appellant, plaintiff, and they are referred to at length in the discussion. The principal argument is directed to the alleged insufficiency of the evidence to sustain the findings of the court. As aptly said in respondent's brief, we think, if we were inclined to disturb the findings and make others, we could not do so on the evidence submitted; first, because we cannot say that the preponderance is against the findings or any one of them, and, further, because the evidence especially on the part of the plaintiff, is so vague, indefinite, unreliable, contradictory, and evasive that it would be impossible for us to arrive at any intelligent conclusion as to how much money the plaintiff put into the business; and we wonder that the district court was able to arrive at any conclusion.

When two ignorant men get together and invest their joint funds during a period of over twenty years, without any definite plan or arrangement, as in the case before us, and without any accounting made or demanded on either side for many years, and with never a settlement, a court, if it do anything upon such a poor showing, cannot do any more than make a reasonably fair estimate; and this should not be disturbed on appeal, since it is impossible, as we have said, to say that there is a preponderance against the findings or any of them. The

defendant seems to have been as fair as plaintiff in his evidence, and each testified as to many items; but neither of them, except in rare instances, was able to make any definite statement whatever as to how much money either one put in or what was done with it.

Counsel for appellant, in endeavoring to show that the court erred, submits "a number of calculations as they would suggest themselves to the investigator from different points of view." One of counsel's calculations, he says, leads to the conclusion that there was due to Henry Knobb, the plaintiff, the sum of \$4,813.43 more than is invested in real estate. Another view is that there is thus due Henry \$6,705.69, and a third suggestion is that the evidence shows the sum of \$6,334.19 still due to the aforesaid Henry. These three different results largely come from computations based upon guesses and conflicting testimony of Henry as to how much and how often he put money into the hands of his brother. It thus seems to have been impossible for counsel for appellant to definitely state the amount.

The judgment and order denying a new trial are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

DEMARS, RESPONDENT, v. HUDON, APPELLANT.

(No. 2,161.)

(Submitted October 6, 1905. Decided November 6, 1905.)

Pledges—Conversion—Waiver of Tort—Trial by Jury—Accounting—Interest.

Pledges—Accounting—Conversion—Election—Waiver of Tort.

1. Where a pledgor demanded an accounting by the pledgee, not only of the proceeds derived from the use of the property pledged, but also for the price realized from a wrongful sale thereof, and thereafter sued to recover such sums, he thereby waived the pledgee's tort in converting the property.

Pledges—Accounting—Equity—Trial by Jury.

2. A suit brought by a pledgor to compel the pledgee to render an accounting of the proceeds derived from the use of the property pledged and to recover the price realized from a wrongful sale thereof, is an action for an accounting cognizable in a court of equity, in which the defendant is not entitled to a jury trial.

Pledges—Conversion of Pledge—Extent of Liability.

3. Where a pledgee converted the property pledged by selling the same on credit for \$2,500, without interest, taking the purchaser's secured note, which he surrendered on payment of \$2,050, the pledgor, on waiving the tort, was entitled to recover the full sale price, and was not limited to the amount which the pledgee had actually received from the purchaser.

Pledges—Conversion—Accounting—Interest.

4. Where a pledgee of certain property sold the same on credit, without interest, the pledgor, on ratifying the sale and suing the pledgee for an accounting, was chargeable with interest on the loan secured by the pledge at the agreed rate to the date at which defendant received payment for the property sold sufficient to discharge the indebtedness, and not merely to the date of the sale.

Appeal from District Court, Silver Bow County; E. W. Harnsey, Judge.

ACTION by Joseph Demars against Charles O. Hudon. From a judgment for plaintiff and from an order denying him a new trial, defendant appeals. Modified and affirmed.

Mr. John J. McHatton, for Appellant.

The respondent having contended that this is an action in equity, and having secured a judgment thereon, the appellant is entitled, for the purpose of pointing out the errors in the case, not only to point out the errors that the court committed in treating the action as one in equity and proceeding under such theory, but in pointing out the errors that were committed, even if the action be regarded as one in equity. We do not conceive that we are bound as by admission that this is an action in equity by treating it from that standpoint, for the purpose of showing the errors which the court committed against us, and we think that the respondent is bound by the position which he has taken.

If there was a tort, or the defendant wrongfully disposed of the property, as claimed by the plaintiff, the plaintiff might waive this and sue for an accounting. (*Child v. Hugg*, 41 Cal. 519; *Strong v. Adams*, 30 Vt. 221, 73 Am. Dec. 305; *Lawson on Bailments*, 110.) One who sues for sale money impliedly

affirms the sale. (*Nelson v. Carrington*, 4 Munf. (Va.) 332, 6 Am. Dec. 519.) If the property sold or disposed of was wrongfully disposed of, the plaintiff's action would be trover; if properly disposed of, his action is for an accounting. (*Stephens v. Hartley*, 2 Mont. 504.) This the plaintiff claims to have done in this action. The court and jury forced the defendant to defend the action on the theory that he was bound to account. So the defendant, being obliged to defend in that manner, presented an accounting against the claims of the plaintiff.

The plaintiff and the court have charged the defendant as trustee, and it is elementary that a trustee will only be held for actual receipts and profits. (27 Am. & Eng. Ency. of Law, p. 168; *Hoile v. Bailey*, 58 Wis. 434, 17 N. W. 322; *Rainsford v. Rainsford*, McMull. Eq. (S. C.) 16; *Farmers' etc. Bank v. Kimball Milling Co.*, 1 S. Dak. 388, 36 Am. St. Rep. 739, 47 N. W. 402.) The defendant is protected so long as he acted upon a *bona fide* belief that he had authority to act. (1 Am. & Eng. Ency. of Law, 2d ed., p. 1124.) But the plaintiff claims to have ratified his conduct, and the plaintiff is, therefore, bound. (*Bushnell v. McCauley*, 7 Cal. 421.)

Mr. Lewis P. Forestell, for Respondent.

Defendant was guilty of conversion. (*Reardon v. Patterson*, 19 Mont. 231, 234, 47 Pac. 966, and cases cited; Civ. Code, secs. 3906, 3909, 4333; Jones on Pledges, sec. 614; *Wheeler v. Newbould*, 16 N. Y. 392; *Goldsmith v. First Methodist Church*, 25 Minn. 202.) "An action to redeem the pledges is not the pledgor's only or usual remedy for the recovery of it after payment or tender. He may sue in trover for a conversion of it, and this is the more usual and better remedy when the pledgee either refuses to return it upon demand or has willfully disposed of it so as to put it out of his power to return it." (Jones on Pledges, sec. 561, citing: *Luckey v. Gannon*, 37 How. Pr. (N. Y.) 134, 1 Sweeney, 12; *Campbell v. Parker*, 9 Bosw. (N. Y.) 322; *Flower v. Sproule*, 2 A. K. Marsh. (Ky.) 54; *Niles v. Edwards*, 90 Cal. 10, 27 Pac. 159, 296; *Loughborough v. McNevin*, 74 Cal. 250, 5 Am. St. Rep. 435, 14 Pac. 369, 15 Pac. 773.)

Tender of debt and demand for property are unnecessary before bringing suit for conversion. (*Rosenzweig v. Fraser*, 82 Ind. 342; *Stearns v. Marsh*, 4 Denio, 227, 47 Am. Dec. 248; *Lewis v. Graham*, 4 Abb. Pr. 106; *Glidden v. Mechanics' Nat. Bank*, 53 Ohio St. 588, 42 N. E. 995, 43 L. R. A. 737, 751, 752; *Ogden v. Lathrop*, 31 N. Y. Super. Ct. (1 Sweeney) 643; *Cortelyou v. Lansing*, 2 Caines Cas. 200; *Smith v. Savin*, 69 Hun, 311, 23 N. Y. Supp. 568, 30 Abb. N. C. 192; *Stearns v. Marsh*, 4 Denio, 227, 47 Am. Dec. 248.)

Where pledged property is sold without notice, the pledgee will be liable for the full value of the property pledged. (*McLean v. Walker*, 10 Johns. 472; *Stearns v. Marsh*, 4 Denio, 227, 47 Am. Dec. 248.) And where goods have been converted but not sold, an action based upon the implied promise to pay the price or value of the goods may be maintained. (*Pomeroy's Remedies and Remedial Rights*, 3d ed., sec. 569; *Galvin v. Mac. Mining etc. Co.*, 14 Mont. 508, 517, 518, 37 Pac. 366; *Tuttle v. Campbell*, 74 Mich. 652, 16 Am. St. Rep. 652, 42 N. W. 384.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The complaint in this action alleges that on August 31, 1898, the plaintiff delivered to the defendant certain personal property, comprising a teaming outfit of the value of \$3,000, by way of pledge, to secure the sum of \$1,275, then borrowed by the plaintiff from the defendant; that defendant accepted the property as such pledge and agreed to employ the same and apply the net earnings of it to the liquidation of such indebtedness, and to fully account to the plaintiff for such earnings; that the defendant in pursuance of such agreement did employ the outfit and received from such employment large sums of money, the exact amount of which is to the plaintiff unknown, for, although often requested so to do, the defendant has refused to render any account whatever; that on December 15, 1898, the defendant, disregarding his obligations as such pledgee, wrongfully sold and disposed of the property for the sum of

\$2,500; and that before the commencement of this action the plaintiff demanded an accounting of all moneys derived from the sale of such property, as well as from the earnings of the same, which was refused. The prayer is for an accounting by the defendant for the earnings of the property while in his possession, as well as for the price received from the sale of the same.

The answer denies generally and specifically the allegations of the complaint, except that defendant received the property and employed the same, and that he sold it and refused to account for either the sale price or the proceeds of its employment. Defendant alleges that, while the property was in his possession, the cost of keeping the same was greater than its earnings. While there was nothing whatever in the answer to require a reply, a reply was, in fact, filed, which sets forth that, when the transaction of August 31, 1898, was had, the plaintiff did execute and deliver to the defendant a bill of sale for the property, absolute on its face, but that possession of the property was delivered to the defendant at the same time, and that the bill of sale was intended to be, and was in fact, only evidence of security for the indebtedness owing to the plaintiff by the defendant.

Only one issue was presented by the pleadings: Was the transaction of August 31, 1898, an absolute sale, or was it a pledge? If a sale, then there is no merit in the controversy; if a pledge, then defendant owed the duty of accounting to the plaintiff.

At the commencement of the trial the court, in answer to a suggestion of counsel, intimated that to the jury impaneled would be submitted a special interrogatory to determine whether the transaction between the parties was a sale or a pledge. To this statement from the court counsel for defendant excepted. The jury found that the transaction constituted a pledge, and thereupon the court adopted such finding and referred the cause to a referee to take the accounting. Upon such accounting the referee found that there was due to the plaintiff from the defendant a balance of \$769.68. This report was adopted

by the court, with the exception that the court allowed the defendant \$300 for his care of the property while in his possession, and entered judgment in favor of the plaintiff for \$469.68, with interest. From this judgment, and from an order denying the defendant a new trial, he appealed.

Some contention is now made that the defendant was entitled to a jury trial of the case as a whole, if the action is one in conversion, and in this counsel is correct. But, notwithstanding counsel for respondent consumes his entire brief attempting to show that plaintiff's action was one in conversion and in attempting to justify the court's treatment of it, we will not reverse the trial court, if it proceeded upon a correct theory of the case, and according to that theory did not commit reversible error, even though counsel for respondent in this court takes a position which would necessitate a reversal, if adopted by us.

The complaint shows upon its face that after the sale of the property by the defendant, the plaintiff demanded an accounting, not only of the proceeds derived from the use of the property by the defendant, but for the sale price of the property as well, and brings this action to recover those sums. These acts upon his part constituted a waiver of the tort. (*Strong v. Adams*, 30 Vt. 221, 73 Am. Dec. 305.) It is elementary that one having a cause of action of this character may waive the tort and sue for an accounting. In fact, the Code specifically confers upon him this right. (Civ. Code, sec. 2979.)

The action is clearly one for an accounting, cognizable in a court of equity (1 Cyc. 427), and, being such, the defendant was not entitled to a jury trial. The court could with propriety call to its assistance a jury to determine the issue of facts raised by the pleadings, as it did in this instance, and the jury having found that the transaction of August 31, 1898, was a pledge, there remained nothing to determine but the amount, if any, due the plaintiff from the defendant from the sale of the property and its use while in the possession of the defendant, less the amount of the indebtedness owing from the plaintiff to the defendant, to be determined by an accounting, which the court

could have taken or which it could take by a referee, as was done in this case.

The principal complaint made here is that the defendant was charged with the full sale price of the property (\$2,500), whereas counsel for the defendant contends that he can be charged only with the amount which he received from such sale. The record discloses that the sale was made on credit, without interest, that the defendant took a note for the price, which was secured, and that, when the sum of \$2,050 had been paid, he surrendered up the note, and, as he says, took the purchaser's word for the balance. Without any excuse whatever for his apparent negligence in this respect, the defendant now insists that he should not be held to account for such balance. While the plaintiff will be held to have approved the sale by suing for an accounting, he cannot be held to have waived his right to insist upon an accounting for the full purchase price; otherwise, the defendant might have forgiven the purchaser one-half of the price, or any other portion, and have bound the plaintiff thereby. If the remaining \$450 is not paid, the defendant has no one to blame but himself, and is not in a position to complain for his own wrongful act.

While it is a general rule that a trustee can be held responsible only for the amount which he receives (28 Am. & Eng. Ency. of Law, 1079), yet to that rule is this exception: That, whenever he has been guilty either of actual misconduct or unreasonable negligence in the performance of his duty, he becomes responsible to the person for whom the trust property is held, and is chargeable in equity with all damages caused to the estate by his breach of trust. (28 Am. & Eng. Ency. of Law, 1059.) As, for instance, he will be held liable for neglecting to take proper steps to collect from a purchaser the full purchase price of property sold. (28 Am. & Eng. Ency. of Law, 1069.)

However, in determining the amount due on the accounting, we think the court erred. It is conceded that while in the possession of the defendant the property earned \$1,391.28, and this, together with the sale price of the property (\$2,500), amounts to \$3,891.28, with which the defendant is properly chargeable.

Expenses incurred by the defendant in caring for the property, to the amount of \$1,714.48, are admitted. In addition to this, the court allowed the defendant \$300 for his time and trouble in caring for the property, and \$87.50 for the services of a bookkeeper to keep the accounts, and no complaint is made of this action of the court. Of course, the defendant was entitled to be credited with the amount of his loan to plaintiff, \$1,275, and to receive interest thereon at the rate agreed upon, one per cent per month. But in computing this interest the court limited the time during which the interest should be allowed to the date of the sale, December, 1898, whereas defendant should have been allowed interest to the date at which he received payment for the property sufficient to discharge this indebtedness, which was February 14, 1900, for, as plaintiff is held to have approved the sale, he must be held to have approved it as made; that is, on time, without interest. The court only allowed the defendant \$44.62 interest on the loan, whereas he should have been credited with interest amounting to \$223.12, a difference of \$178.50.

The order overruling the motion for a new trial is affirmed. The cause will be remanded to the district court, with direction to modify the judgment by decreasing the amount thereof by \$178.50, and, when so modified, it will be affirmed. Each party will pay his respective costs in this court.

Modified and affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

STATE EX REL. ALLEN, APPELLANT, v. HAWKINS ET AL.,
RESPONDENTS.

(No. 2,168.)

(Submitted October 7, 1905. Decided November 6, 1905.)

Appealable Orders—Prohibition—Motion to Quash—Demurrer.

1. Under Code of Civil Procedure, section 1722, as amended by Session Laws, 1899, page 146, neither an order sustaining a demurrer, nor an order sustaining a motion to quash an alternative writ of prohibition is appealable.

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Appeal from District Court, Madison County; M. H. Parker, Judge.

APPLICATION by the state, on relation of George R. Allen, for a writ of prohibition against Robert N. Hawkins and others, commissioners of Madison county. A motion to quash an alternative writ was granted, and relator appeals. Dismissed.

Mr. W. A. Clark, and Mr. George R. Allen, for Appellant.

Messrs. Kirk & Clinton, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In June, 1904, certain persons representing themselves to be resident taxpayers of the town of Twin Bridges, in Madison county, presented to the board of county commissioners a written petition in which, among other things, they alleged that the town of Twin Bridges did not have three hundred inhabitants, and asked the board to appoint a competent person to take the census of such town for the purpose of having its corporate existence discontinued. The board, having acted upon the petition and having made an order for the appointment of a person to take the census, the town clerk commenced proceedings in the district court to secure a writ of prohibition to restrain the board from further proceeding in the matter. An alternative writ of prohibition was issued and served. Upon the return the defendant board of county commissioners moved to quash the alternative writ and answered the order to show cause embraced in such writ. The court sustained the motion and quashed the alternative writ in an order as follows: "The motion to quash the writ of prohibition heretofore submitted and by the court taken under advisement. The court now sustains the motion and orders the application dismissed, to which ruling plaintiff excepts, and all further proceedings are stayed for five days."

Plaintiff's notice of appeal specifies that he appeals to this court from the order of the district court sustaining the motion of defendants to quash and dismiss said petition of plaintiff,

and sustaining the demurrer of defendants to said petition, and from the whole of each of said orders.

In the record presented to this court there is not any judgment, and in fact the notice of appeal does not indicate that an appeal from a judgment is intended. We are unable to understand what is meant by the reference in the notice of appeal to the order sustaining defendants' demurrer to plaintiff's petition, unless the reference is to the order sustaining the motion to quash. Neither an order sustaining a demurrer nor an order sustaining a motion to quash an alternative writ of prohibition is appealable. Section 1722 of the Code of Civil Procedure, as amended by an Act of the Sixth Legislative Assembly (Session Laws, 1899, p. 146), enumerates all appealable orders, and neither of those mentioned in this notice of appeal is included. As the orders from which this appeal was attempted to be taken are not appealable orders, this court cannot review the case on its merits, and the appeal is dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
CONCUR.

STATE, APPELLANT, v. CUDAHY PACKING CO. ET AL.,
RESPONDENTS.

(No. 2,219.)

(Submitted November 6, 1905. Decided November 17, 1905.)

*Anti-trust Legislation—Validity—Constitutional Law—Equal
Protection of the Laws—Statutory Construction.*

Federal Constitution—Interpretation by Federal Supreme Court—Binding upon State Courts.

1. The Constitution of the United States is, within the scope of its provisions, the supreme law of the land, and state courts and legislatures are bound by it as well as by the interpretation put upon its provisions by the federal supreme court.

Anti-trust Legislation—Constitutional Law.

2. Section 321 of the Penal Code, prohibiting the formation of combinations or trusts for the purpose of fixing the price or regulat-

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ing the production of articles of commerce, and prescribing penalties for violations thereof, is, by reason of the provisions of section 325 of the same Code, to the effect that such prohibition shall not apply to persons engaged in agriculture and horticulture, obnoxious to that portion of the Fourteenth Amendment to the federal Constitution which declares that "no state shall deny to any person within its jurisdiction the equal protection of the laws," and both sections, being dependent upon each other, are therefore void.

Statutory Construction—Elimination.

3. Courts may not, by process of elimination, make statutory provisions apply or extend to subjects not falling clearly within their terms.

Statutory Construction—Meaning of Words Used.

4. Where the intention of the legislature may be inferred from the plain meaning of the words of a statute, the court cannot go further and apply other means of interpretation, it being only where there is a doubt as to the intention that other rules may be applied.

Appeal from District Court, Lewis and Clark County; Henry C. Smith, Judge.

INFORMATION by the state against the Cudahy Packing Company and others. From a judgment for defendants, the state appeals. *Affirmed.*

Mr. Albert J. Galen, Attorney General, and Mr. E. M. Hall, Assistant Attorney General, for Appellant.

It is well settled by numerous decisions of the supreme court of the United States that the construction and meaning of a state law, adopted by the supreme court of the state, will be accepted by the United States supreme court, provided the state law, as so construed by the state court, is not in violation of any provision of the Constitution of the United States. If the exemptions attempted to be made by section 325, Penal Code, are surplusage, void or invalid, under section 20, Article XV, of our Constitution, and if this court should hold that the enactment of a void or invalid exemption in direct violation of a constitutional provision is not in law to be considered as an inducement for the enactment of a valid law, pursuant to a mandatory provision of the Constitution, then the valid portion of the law would stand as if no exemption therefrom had ever been attempted. Under such a construction section 321, Penal Code, would be constitutional and would not be in conflict with any portion of the United States Constitution. (*Waters-Pierce Oil*

Co. v. Texas, 177 U. S. 42, 20 Sup. Ct. 518, 44 L. Ed. 663; *Tullis v. Lake Erie etc. R. R. Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192.)

Mr. M. S. Gunn, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The respondents were charged by information, filed by the attorney general in the district court of Lewis and Clark county, with the crime of conspiracy, under section 321 of the Penal Code. The charge in substance is that the respondents did on or about December 1, 1904, unlawfully agree and combine together to fix and control the price of certain articles of commerce consumed by the people of the state of Montana, and to destroy competition by restricting trade therein, to wit, meats of all kinds and meat products, and did then and there fix the price and offer for sale, and sell, said articles to the people of said county contrary to the force and effect of the statute, etc. The respondents demurred to the information on the ground that the facts stated do not constitute a public offense. After argument the court allowed the demurrer, and gave judgment accordingly. Thereupon the state appealed.

The question submitted for decision is whether the legislation contained in Chapter VIII, Title VII, of Part I, of the Penal Code, of which said section 321 is a part, is obnoxious to that portion of the Fourteenth Amendment to the Constitution of the United States which declares that "no state shall * * * deny to any person within its jurisdiction the equal protection of the laws." The legislation referred to deals with the subject of criminal conspiracy, denouncing the acts constituting the crime and providing for its punishment. The portions thereof involved here are sections 321 and 325, as follows:

"Sec. 321. Every person, corporation, stock company, or association of persons in this state who, directly or indirectly, combine or form what is known as a trust, or make any contract with any person or persons, corporations or stock companies,

foreign or domestic, through their stockholders, directors, officers, or in any manner whatever, for the purpose of fixing the price or regulating the production of any article of commerce, or of the product of the soil for consumption by the people, or to create or carry out any restriction in trade, to limit productions, or increase or reduce the price of merchandise or commodities, or to prevent competition in merchandise or commodities, or to fix a standard or figure whereby the price of any article of merchandise, commerce or produce, intended for sale, use or consumption, will be in any way controlled, or to create a monopoly in the manufacture, sale or transportation of any such article, or to enter into an obligation by which they shall bind others or themselves not to manufacture, sell, or transport any such article below a common standard or figure, or by which they agree to keep such article or transportation at a fixed or graduated figure, or by which they settle the price of such articles, so as to preclude unrestricted competition, is punishable by imprisonment in the state prison not exceeding five years or by a fine not exceeding ten thousand dollars, or both. Every corporation violating the provisions of this section, forfeits to the state all its property and franchises, and in case of a foreign corporation it is prohibited from carrying on business in the state."

"Sec. 325. The provisions of this chapter do not apply to any arrangement, agreement or combination between laborers made with the object of lessening the number of hours of labor or increasing wages, nor to persons engaged in horticulture or agriculture, with a view of enhancing the price of their products."

These provisions are the result of an effort on the part of the legislature to carry out the mandate of the Constitution of this state, which declares: "No incorporation, stock company, person or association of persons in the state of Montana, shall directly, or indirectly, combine or form what is known as a trust, or make any contract with any person, or persons, corporations, or stock company, foreign or domestic, through their stockholders, trustees, or in any manner whatever, for the purpose of fixing the

price, or regulating the production of any article of commerce, or of the product of the soil, for consumption by the people. The legislative assembly shall pass laws for the enforcement thereof by adequate penalties to the extent, if necessary for that purpose, of the forfeiture of their property and franchises, and in case of foreign corporations prohibiting them from carrying on business in the state." (Constitution, Art. XV, sec. 20.)

The contention made by respondents in the district court and here is that the exception contained in section 325, by which the provisions of section 321 are declared not to apply to persons engaged in horticulture and agriculture, renders the provision of section 321 unconstitutional. The language of the last clause of this section is vague and indefinite; but, reading the whole section together, this clause should be construed to read as follows: "Nor to any arrangement, agreement or combination made by persons engaged in horticulture or agriculture, with a view of enhancing the price of their products." The obvious purpose of the legislature was to except from the operation of section 321 devices which might be resorted to by horticulturists and agriculturists to enhance the value of their products and destroy competition in trade therein when they came to put them upon the market.

The attorney general does not seriously controvert the proposition that the legislation as it stands is open to the constitutional objection urged against it, but he insists that since the provisions of the Constitution of the state are mandatory, and since the legislature has declared in section 321 generally against every species and character of combination denounced therein, section 325 can be held inoperative, leaving section 321 to stand in full force. In this connection he suggests, also, that neither the provisions of section 321 nor those of the Constitution by any indtment can include labor organizations; and that, so far as section 325 refers to this character of combinations, it is simply nugatory, and a disregard of it will not extend or affect the provisions of section 321.

It is clear that, if this section of the state Constitution does not apply to combinations of laborers for the purposes stated, no

exception was necessary to exempt them, for section 321, *supra*, is no more specific in its terms than is the section of the Constitution; and, if the phrases "articles of commerce" and "products of the soil" in the former do not apply to or include them, neither do they, nor the terms "trade," "merchandise," and "commodities," as used in the latter, include them. But an inquiry into the question thus suggested is not now pertinent. Nor is it necessary to inquire into the question, also suggested, whether this exception does in itself render the legislation obnoxious to the provision of the federal Constitution invoked by respondents. Nor, again, is it necessary to inquire whether the legislation is, by reason of any exception stated in it, obnoxious to any provision of our state Constitution.

The Constitution of the United States is, within the scope of its provisions, the supreme law of the land, and state courts and legislatures are bound by it as well as by the interpretation put upon its provisions by the federal court of last resort. In the cases of *Connolly and Dee v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, the court had before it the identical question presented in this case. In these cases the supreme court of the United States considered the validity of the trust statute of Illinois of 1893. That Act in terms prohibited combinations of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or any of them, for any or all of the following purposes: To restrict trade; to limit production, or to fix the price of merchandise or of commodities; to prevent competition in manufacture, transportation, sale, or purchase of any product of industry; to fix or control prices; or to establish any agency for that purpose; or to make or enter into any contract or agreement by which the parties should bind themselves not to sell, dispose of, or transport any article of trade below a common standard figure or card or list price, or any contract or agreement to keep the price of any such article or its transportation at such fixed price, in order to prevent free and unrestricted competition. Severe penalties were provided for the violation of any of its provisions. The ninth section of the Act provided: "The provisions of this Act

shall not apply to agricultural products or livestock while in the hands of the producer or raiser." The tenth section declared that any purchaser of any article or commodity from any person, firm, or corporation, or association of persons doing business in the state contrary to any of the provisions of the Act should not be liable for the price of such article, and might plead the Act as a defense to any suit for the price.

The Union Sewer Pipe Company brought its action in the circuit court of the United States for the northern district of Illinois against the plaintiffs in error to recover the price of certain sewer pipe sold by it to them. After alleging that the corporation was a combination in the form of a trust, and was engaged in conducting its business in Illinois in violation of the statute, they relied, among other defenses, upon the provisions of section 10 of the statute to defeat the company's claim. The circuit court held the Act to be in violation of the above provision of the federal Constitution. Upon error to the supreme court, that court, after a full discussion of its former decisions defining the meaning of the portion of the amendment in question, declared that the Act was rendered void by this exception from its operation of persons engaged in agriculture and raising of livestock. The court states its conclusion thus: "We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals, if they violate the regulations prescribed by the state, for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill, or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

The court, in discussing the meaning of this provision of the Constitution, cites with approval the case of *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, in which Mr. Justice Field uses this language: "The Fourteenth Amendment,

in declaring that no state 'shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

The court also cites with approval the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, in which it was said that "the equal protection of the laws is a pledge of the protection of equal laws," herein declaring, in substance, that not only must the law as enacted furnish equal protection to all, but also that the legislature, in enacting any law, must so adjust its provisions that it will operate equally upon the individuals constituting the class of citizens whose conduct it is intended to control. In the Illinois Act the exception applies to agriculturists and livestock raisers. The exception in our statute applies to those engaged in agriculture and horticulture; but this slight difference does not affect the point at issue.

Though there might be differences of opinion as to the proper interpretation of the Fourteenth Amendment, if it were a new question, these decisions of the court of last resort are binding upon this court, and, under the mandate of the Constitution of the United States, are the supreme law of the land. Accepting

them as such, we must conclude that the legislation is void, unless section 325 can be eliminated, leaving section 321 in operation.

In the cases of *Conolly and Dee v. Union Sewer Pipe Co.*, *supra*, the supreme court of the United States also considered the question whether or not the Act under consideration could be held operative by eliminating the ninth section thereof, which makes the exception of the class of persons engaged in agriculture and stock raising. The court stated the rule to be that, "if different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative." The court then proceeds to discuss the other provisions of the Act, and concludes that, to eliminate the ninth section and sustain the other provisions, would make the Act apply to agriculturists and livestock raisers—a result not contemplated by the legislature, since by the terms of the rest of it, all persons engaged in domestic trade were included. This is a recognition of the soundness of the proposition that the courts may not by process of interpolation or elimination make statutory provisions apply or extend to subjects not falling clearly within their terms; for by so doing they would to this extent usurp the functions of the lawmaking department of the government. Mr. Justice Harlan, in the opinion says: "If the latter section be eliminated as unconstitutional, then the Act, if it stands, will apply to agriculturists and livestock dealers. Those classes would in that way be reached and fined, when, evidently, the legislature intended that they should not be regarded as offending against the law even if they did combine their capital, skill, or acts in respect of their products or stock in hand."

In *United States v. Reese et al.*, 92 U. S. 214, 23 L. Ed. 563, the court had before it the statute of Congress enacted May 31, 1870 (16 Stat. 140, c. 114), for the purpose of carrying into effect the provisions of the Fifteenth Amendment to the Consti-

tution of the United States, declaring that the right of citizens of the United States to vote shall not be denied or abridged on account of race, color or previous condition of servitude, and that Congress shall have power to enforce this Article by appropriate legislation. The third and fourth sections of the Act went beyond the purview of the amendment, and denounced as a crime any act by which a voter was deprived of his right to vote, whether on account of race, color, or previous condition of servitude or for other cause. It was held that the Act was not legislation appropriate to carry the amendment into effect, because it was broader in its terms than the amendment authorized, and was therefore unconstitutional; and, further, that the court could not reject the part which was invalid and retain the part which fell within the power of Congress, because the Act must be taken as a whole. The court, speaking through the chief justice, said: "The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute, so as to make it specific, when, as expressed, it is general only. It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government."

So in *Sprague v. Thompson*, 118 U. S. 90, 6 Sup. Ct. 988, 30 L. Ed. 115, the argument was made that certain unauthorized exceptions made by a statute of the state of Georgia could be eliminated and the rest be allowed to stand. The supreme court of Georgia had so held, but the court said: "But the insuperable difficulty with the application of that principle of construction to the present instance is that, by rejecting the exceptions intended by the legislature of Georgia, the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what anyone can say it would have enacted in

view of the illegality of the exceptions." The following cases are in point, and illustrate the application of the rule: *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108; *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 29 L. Ed. 185; *Johnson v. State*, 59 N. J. L. 535, 37 Atl. 949, 39 Atl. 646, 38 L. R. A. 373; *Ames et al. v. People*, 25 Colo. 508, 55 Pac. 725; *State ex rel. McHugh v. Sheriff*, 48 Minn. 236, 31 Am. St. Rep. 650, 51 N. W. 112; *Kellyville Coal Co. v. Harrier*, 207 Ill. 624, 99 Am. St. Rep. 240, 69 N. E. 927; *Union County Nat. Bank v. Ozan Lumber Co. (C. C.)*, 127 Fed. 206; *In re Wong Hane*, 108 Cal. 680, 49 Am. St. Rep. 138, 41 Pac. 693. See, also, Cooley's Constitutional Limitations, 7th ed., 246 et seq.

Applying it to the statute now under consideration, the query is presented: Are sections 321 and 325 so independent of each other that the latter may be eliminated and the former be allowed to stand? To this query, we think the answer must be in the negative. The legislature in passing the law was attempting to make effective the provision of the constitution. This provision applies to every species of combination to control prices of products of the soil or manufacture consumed by the people of this state, or to create a monopoly in such products. The mandate to the legislature is, that it shall enforce the provision by appropriate legislation. The legislation is, therefore, the scheme adopted for that purpose. It is not supposable that it would have been enacted without the limitation contained in section 325. It must therefore be taken as a whole, and stand as it is, or both provisions must fall together. As it stands, agriculturists and horticulturists, though engaged in domestic trade, are not subject to any penalty. If the exception be eliminated and section 321 be allowed to stand, they will fall within the reach of the criminal courts and be punishable as criminals—not by intention of the law-making power as expressed in the enactment, but by virtue of arbitrary legislation by the court.

But the attorney general insists that this court has already committed itself to the view he contends for by the decision in

Northwestern Mutual Life Insurance Co. v. Lewis and Clark County, 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982. With this argument we do not agree. We think that case clearly distinguishable from this in two important particulars. This case involves the construction of a statute highly penal. To such statutes the strict rule is to be applied—not so strict as to defeat the plain intent of the legislature, but so strict as to give the words of the statute the sense in which they are obviously used. (*United States v. Reese et al.*, *supra*.) If, applying this rule, the legislative intent cannot be given effect, the particular law must fail. In other words, it must stand as enacted, or must be declared void as a whole. (*Wynehamer v. People*, 13 N. Y. 378.) Again, the court had under consideration section 681 of the Civil Code, which imposed a tax upon the excess of premiums collected by insurance companies doing business in this state. This section also contains an exemption of the personal property of such companies. It was held that the exemption clause was so far independent of the other provisions of that section that it could be eliminated without affecting the rest of the section or extending its application. From this point of view the case is not applicable.

It is also said that the legislation under consideration was enacted under a mandatory constitutional provision prohibiting combinations in the form of trusts in this state, whereas in Illinois there was no such provision; and for this reason the cases of *Connolly and Dee v. Union Sewer Pipe Co.*, *supra*, are distinguishable from the case at bar. This argument proceeds upon the assumption that the legislature intended to enact a constitutional law, but having failed to do so, this court may give effect to this intention by holding section 325 void and allowing 321 to stand. This is but another way of putting the question which we have already considered and decided.

The intention of any legislation must be inferred in the first place from the plain meaning of the words used. If this intention can be so arrived at, the courts may not go further and apply other means of interpretation. It is only where there is a doubt as to the intention that other rules may be applied.

This statute is clear and certain as to its intention, and that intention, as expressed, is to except from the operation of section 321 persons engaged in agriculture and horticulture.

We can see no sound distinction between a case where Congress has gone beyond the limit of power conferred upon it by the Constitution of the United States, as was the case in *United States v. Reese et al.*, and a case like the present, where the legislature has stopped short of the plain mandate of the state Constitution, and made exceptions which are unauthorized; nor between a case where the legislature is undertaking to give effect to the mandate of a Constitution and within limitations prescribed thereby, and a case where the legislature acts without constitutional restriction in an endeavor to give effect to the will of the people.

The result is that sections 321 and 325 are so dependent upon each other that both must fall. Nothing said herein, however, must be construed as affecting the constitutionality of the other provisions of the chapter of the Code of which these sections are a part.

The judgment of the district court is correct and is affirmed.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY, concur.

PLEDGE, APPELLANT, v. GRIFFITH, RESPONDENT.

(No. 2,190.)

(Submitted November 8, 1905. Decided November 17, 1905.)

Election Contests—Appeal—Marked Ballots—Exhibits—Counting of Illegal Votes—When Harmless Error.

Election Contests—Appeal—Exhibits—Marked Ballots.

1. *Held*, on appeal from a judgment in an election contest, that ballots, alleged to have been used on the trial and brought to the supreme court in a box to which was attached a memorandum of the trial judge to the effect that he had received the box from the clerk of the district court, had never opened it, but believed that

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it contained the original ballots, may not be looked to for the purpose of ascertaining whether any of said ballots bear distinguishing marks, because not identified as the original ballots in their original form as introduced in evidence in the court below, and because of the absence of a certificate of the judge to that effect. (Rule VIII, Subd. 1, Rules of Supreme Court.)

Election Contests—Counting of Illegal Votes—When Harmless Error.

2. The votes cast for respondent in an election contest, in the county numbered 619; of these 37 were cast at a precinct located on an Indian reservation. The total vote of his opponent was 539, of which 12 were cast at said precinct. *Held*, that the reception of the ballots cast at said precinct, and alleged to be illegal, did not prejudice the rights of the unsuccessful candidate, nor those of the elector who instituted the contest proceedings, since, after deduction of the votes cast at that precinct for each candidate, from the total vote received by each in the county, the result of the election would not be affected.

Appeal from District Court, Valley County; Henry C. Smith, Judge.

PROCEEDING instituted by T. R. Pledge as an elector of Valley County, to contest the election of Walter S. Griffith, as sheriff of that county. From a judgment in favor of contestee the contestant appeals.

Mr. Jesse B. Roote, Mr. William G. Downing, and Messrs. Hurd & Dignan, for Appellant.

Section 1358, Political Code, as amended by House Bill No. 59, Session Laws of 1901, pages 117 to 119, included, provides that: "No elector shall place any mark upon his ballot by which it may afterward be identified as the one voted by him." (Sess. Laws, 1901, p. 119.) This law corresponds substantially with section 1215 of the Political Code of California, which provides: "That no voter shall place any mark upon his ballot by which it may afterward be identified as the one voted by him." This law has claimed the construction of the supreme court of California in a number of cases. (*People v. Campbell*, 138 Cal. 19, 70 Pac. 918; *Patterson v. Hanley*, 136 Cal. 270, 68 Pac. 821; *Farnham v. Boland*, 134 Cal. 151, 66 Pac. 200, 366; *Sego v. Stoddard*, 136 Ind. 297, 36 N. E. 204, 22 L. R. A. 468; *Zeis v. Passwater*, 142 Ind. 375, 41 N. E. 796; *Lay v. Parsons*, 104 Cal. 661, 38 Pac. 447; *Tebbe v. Smith*, 108 Cal. 110, 49 Am. St. Rep. 68, 41 Pac. 454, 29 L. R. A. 673; *Lauer*

v. *Estes*, 120 Cal. 654, 56 Pac. 262. See, also, *Steele v. Calhoun*, 61 Miss. 556; *Oglesby v. Sigman*, 58 Miss. 502; *Taylor v. Bleakley*, 55 Kan. 1, 49 Am. St. Rep. 233, 39 Pac. 1045, 28 L. R. A. 683; *Sweeney v. Hjul*, 23 Nev. 409, 48 Pac. 1036.)

The provision of section 1358 of the Political Code of Montana, as amended by House Bill No. 59, Session Laws of 1901, page 117, that no elector shall place any mark upon his ballot by which it may afterward be identified as the one voted by him, is mandatory. (*Patterson v. Hanley*, 136 Cal. 270, 68 Pac. 821; *Murphy v. San Luis Obispo*, 119 Cal. 624, 51 Pac. 1085, 38 L. R. A. 444; *Tebbe v. Smith*, 108 Cal. 111, 49 Am. St. Rep. 68, 41 Pac. 454, 29 L. R. A. 673; *Lay v. Parsons*, 104 Cal. 661, 38 Pac. 447.)

It is certainly against the spirit of the election law, as set forth in section 1245 of the Political Code, for any election to be held within the exterior boundaries of an Indian agency, even though the building in which the balloting takes place is itself situated on the right of way of a railroad, conceding the right of way to be no part of the reservation. The voters themselves lived on the reservation. The voting place was but a few hundred yards from the Indian agent's office, and was "at" a trading post in the Indian country. (*Rogers v. Galloway Female College*, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636; *Pittsburg etc. Ry. Co. v. Moore*, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638.)

Mr. Sam. Stephenson, for Respondent.

It would appear from the finding of the trial court that its refusal to reject the ballots excepted to was not based so much upon the ground that the marks are not distinguishing marks as it is based upon the ground that the evidence does not justify him in finding that the alleged marks were placed upon the ballots by the voters. (*McCardle v. Barstow*, 145 Cal. 135, 78 Pac. 371; *Hannan v. Green*, 143 Cal. 19, 76 Pac. 709; *Trafton v. Quinn*, 143 Cal. 469, 77 Pac. 164; *Rhode v. Steinmetz*, 25 Colo. 308, 55 Pac. 815; *Parker v. Hughes*, 64 Kan. 216, 91 Am. St.

Rep. 216, 67 Pac. 643; *People v. Livingston*, 79 N. Y. 281; McCrary on Elections, sec. 472; *Fishback v. Bramel*, 6 Wyo. 293, 44 Pac. 840.)

Section 1245 of the Political Code is clearly unconstitutional. The Fort Peck Indian Reservation is a part of Valley county. The jurisdiction of the state extends over the Indian reservation, and all white men residing on the reservation and Indians who have dissolved their tribal relations are amenable to the laws of the state, and their property is taxable the same as any other resident of the state of Montana. (See *Cosier v. McMillan*, 22 Mont. 488, 56 Pac. 965; *Stiff v. McLaughlin*, 19 Mont. 300, 48 Pac. 232; *State v. Campbell*, 53 Minn. 354, 55 N. W. 553, 21 L. R. A. 172; *Torrey v. Baldwin*, 3 Wyo. 430, 26 Pac. 908; *Moore v. Beason*, 7 Wyo. 292, 51 Pac. 875.)

Qualified electors residing upon the reservation have the same right to vote as the qualified electors who do not reside upon an Indian reservation, but to deprive them of an election precinct or of a polling place or to require that the polling place should be established a great distance from their habitation in effect deprives them of the right of suffrage. The right of a citizen to vote granted him by the Constitution cannot be impaired or taken away even by an Act of the legislature. (*Earl v. Lewis*, 28 Utah, 116, 77 Pac. 238; *State v. Baker*, 38 Wis. 72; *Attorney General v. Detroit*, 78 Mich. 545, 44 N. W. 388, 7 L. R. A. 99; *Morris v. Powell*, 125 Ind. 281, 25 N. E. 221, 9 L. R. A. 334.) The legislature has no right to pass a law which will deprive any of the qualified electors of the state of the right to vote, or which would inflict a hardship upon any locality or class of persons.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

At the general election held in 1904, Harry Cosner was the Democratic candidate for sheriff of Valley county, Montana, and the respondent, Walter S. Griffith, was the Republican nominee for the same office. Griffith was declared elected and a certificate of election issued to him. Thereupon this appellant,

as an elector of that county, commenced an election contest under the provisions of Title II, Part III, of the Code of Civil Procedure, alleging malconduct on the part of the judges of election in certain particulars enumerated in the statement of contest. Issues having been joined, a trial was had before the court sitting without a jury. The court recounted the ballots and, as result, entered judgment declaring the respondent duly elected to said office. From that judgment the contestant appeals.

In this court only two contentions are made: 1. The court erred in counting for the respondent certain ballots which appellant contends bear distinguishing marks; and 2. The court erred in counting for the respondent the votes cast at Poplar precinct.

1. At the close of the trial the district court made an order as follows: "It was ordered by the court that in the event of an appeal herein, the original ballots excepted and objected to by both parties, marked as exhibits by the stenographer, become part of the record on appeal and be certified up to the supreme court, according to law, and that the bill of exceptions need not copy or set forth the said exhibits, but that the originals be used."

The bill of exceptions does not contain copies of any of the ballots used at the trial. In this court we are asked to consider a large number of ballots which were brought into court as the ballots used upon the hearing in the district court. These ballots are not identified in any manner whatever. There is not any certificate of the judge of the trial court on, or attached to, any of them. The ballots were brought into this court in a box, to which box was attached a memorandum in writing by the judge who presided at the trial of the case, to the effect that he had received the box from the clerk of the district court of Valley county, had never opened it or examined its contents, but believes it contains the original ballots used upon such trial.

Subdivision 1 of Rule VIII of the Rules of this court provides: "Whenever in the trial of an action or other proceeding

appealed to this court, an exhibit of a printed book or pamphlet or other printed or engraved matter, or a model, drawing, map, trademark, plans or illustrations, or other matter formed, drawn, printed or engraved, is introduced or offered in evidence, and it is desired by either party to use the same original exhibit as part of a statement on motion for new trial, or in a bill of exceptions, such exhibit, authenticated by a certificate of the judge of the trial court thereon or attached thereto, may be brought to this court in its original form as introduced in evidence, either bound in the transcript of the record on appeal, if convenient to do so, or as an exhibit accompanying such record to this court. * * *'' There was not even a pretense of compliance with the provisions of this rule.

An original exhibit used in the trial court may be used on appeal in this court, provided it is identified as such original exhibit *in its original form* as introduced in evidence in the court below; and further provided that these facts are made to appear positively by the certificate of the judge who presided at the trial in the court below. In the present instance there is nothing before us to indicate either that these are the original ballots used on the trial of this case, or, if they are, that they are in the original form as introduced in evidence. For these reasons these ballots are not before us for consideration; and, there being no other evidence of the particular markings on the ballots of which complaint is made, we cannot consider this ground of alleged error.

2. It is said that the court erred in counting the ballots cast at Poplar precinct. The court found that this respondent received 619 votes, 37 of which were cast at Poplar precinct; and that his opponent, Cosner, received 539 votes, 12 of which were cast at Poplar precinct. From this it is apparent that, if the votes cast for these respective candidates at Poplar precinct be deducted from the total vote which each received in the county, the result of the election will not be affected; and this being so, the reception of those ballots did not prejudice the rights of the unsuccessful candidate, or of the appellant in this case, and neither can complain.

No error appearing in the record, the judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

33 197
p83 190

PLEDGE, APPELLANT, v. TWEEDIE, RESPONDENT.

(No. 2,191.)

(Submitted November 8, 1905. Decided November 17, 1905.)

(For syllabus, see *Pledge v. Griffith*, ante, page 191.)

Appeal from District Court, Valley County; Henry C. Smith, Judge.

PROCEEDING instituted by T. R. Pledge, as an elector of Valley county to contest the election of James Tweedie, as assessor of that county. From a judgment in favor of contestee, the contestant appeals.

Mr. Jesse B. Roote, Mr. William G. Downing, and Messrs. Hurd & Dignan, for Appellant.

Mr. Sam. Stephenson, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The facts in this case are similar to those in the case of *Pledge v. Griffith*, this day decided. (*Ante*, p. 191.)

At the general election of 1904, Roswell L. Branson was the Democratic nominee for the office of county assessor of Valley county, and this respondent was the Republican nominee for the same office. The appeal is from the judgment declaring this respondent duly elected.

The contentions are the same as in the case of *Pledge v. Griffith* above. The district court found that respondent

Tweedie received a total of 590 votes, 40 of which were cast at Poplar precinct; and that his opponent, Branson, received 543 votes, 9 of which were cast at Poplar precinct. For the reasons stated in the opinion in *Pledge v. Griffith*, above, the judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
CONCUR.

COLEMAN, APPELLANT, v. KERR, RESPONDENT.

(No. 2,189.)

(Submitted November 8, 1905. Decided November 17, 1905.)

(See, also, syllabus in *Pledge v. Griffith*, ante, p. 191.)

*Election Contests—Pleadings—Grounds of Contest—Waiver—
Statutory Construction—Malconduct of Judges.*

Election Contests—Pleadings—Grounds of Contest—Waiver.

1. Section 2010, Code of Civil Procedure, enumerates, among others, "malconduct on the part of the board of judges," and the reception of "illegal votes," as grounds for which any elector of a county may contest the right of one to hold an office therein to which he has been declared elected. Contestant in his statement of contest alleged malconduct on the part of the judges, in that they received and counted for respondent votes claimed to have been illegally cast at a precinct on an Indian reservation. *Held*, that each of the causes enumerated in section 2010 constitutes a separate cause of contest, each independent of the other, and that, while contestant may join grounds of contest embracing the several causes mentioned, if he does not do so, but elects to proceed upon one particular ground, he must be deemed to have waived any other ground enumerated.

Election Contests—Illegal Votes—Reception not Malconduct of Judges.

2. The reception of illegal votes does not constitute "malconduct on the part of the board of judges," within the meaning of section 2010, Code of Civil Procedure, since, under the provisions of the same section, a contest may also be instituted "on account of illegal votes," the legislature thus clearly indicating that it desired to draw a distinction between these two grounds of contest. (Mr. Justice Milburn dissenting.)

Appeal from District Court, Valley County; Henry C. Smith, Judge.

PROCEEDING by Eugene D. Coleman, as an elector of Valley county, to contest the election of John J. Kerr, as county attorney. From a judgment in favor of the contestee the contestant appeals.

Mr. Jesse B. Roote, Mr. William G. Downing, and Messrs. Hurd & Dignan, for Appellant. (See brief in Pledge v. Griffith, ante, p. 191.)

Mr. Sam. Stephenson, for Respondent.

Respondent contends that the ballots cannot be objected to upon the grounds that they contain identification marks under the state of the pleadings in this case. The allegations of the statement of contest in the various precincts are to the effect "that the board of judges were guilty of malconduct in that they wrongfully and unlawfully counted for contestee votes which were never cast in said precinct." This kind of an allegation is not a notice that the contestant expects to prove that certain ballots were counted for contestee which should not have been counted for him on account of the fact that they bore identification marks. Contestee had a right to be informed of the specific grounds of the contest in order that he might prepare for his defense and procure such witnesses as would be necessary for his defense. (See *Robertson v. Board of Commrs.* (Okla.), 79 Pac. 97; *Roberson v. Hubler*, 11 Okla. 297, 67 Pac. 477. See, also, brief in *Pledge v. Griffith, ante*, p. 191.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

At the general election held in 1904, Thomas Dignan was the Democratic candidate for the office of county attorney of Valley county, and this respondent, Kerr, was the Republican nominee for the same office. The facts in this case are similar to those in the cases of *Pledge v. Griffith* and *Pledge v. Tweedie*, this day decided. The appeal is from a judgment declaring the respondent Kerr duly elected to said office.

The contentions made in this court are the same as those advanced in the cases above referred to, and the decisions in those cases determine the first of these contentions adversely to the appellant.

The district court found that the respondent, Kerr, received 574 votes, 41 of which were cast at Poplar precinct, and that his opponent, Dignan, received 556 votes, 7 of which were cast at Poplar precinct; so that, if the votes cast in that precinct be eliminated from consideration, the result of the election would be affected and the respondent would have failed of election, so far as the result would be affected by the vote of that precinct alone.

Throughout the statement of contest the allegations are that the board of election judges and the election judges were guilty of malconduct, specifying wherein such malconduct was manifested, and in their brief counsel for appellant say: "The statement of contest charges malconduct on the part of the board of judges in not counting legal votes for Thomas Dignan, and in counting illegal votes for the respondent, John J. Kerr."

Section 2010 of the Code of Civil Procedure is as follows: "Any elector of a county, town or city, or of any political subdivision of either, may contest the right of any person declared to be elected to an office to be exercised therein, for any of the following causes: 1. For malconduct on the part of the board of judges, or any member thereof. 2. When the person whose right to the office is contested was not, at the time of the election, eligible to such office. 3. When the person whose right is contested has given to any elector or inspector, judge or clerk of the election, any bribe or reward, or has offered any such bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise, defined in Title IV, Part I, of the Penal Code. 4. On account of illegal votes."

Under the allegations of this statement of contest we are asked to consider the question whether the votes cast at Poplar precinct were in fact legal votes. In the absence of sections 2010 to 2025, inclusive, the right of one declared to be

elected to public office, if questioned, would have to be determined by *quo warranto* proceedings (section 1410, Code of Civil Procedure), and in such proceedings any ground might be urged which would render it unlawful for the person declared to be elected to hold or exercise the office. But the provisions of section 2010 above afford a special statutory remedy, provided the person complaining limits his ground of contest to the particular causes therein mentioned. Each of the four grounds enumerated constitutes a separate cause of contest. They are independent of each other, and, while a complaining party might join grounds of contest embracing the separate causes mentioned, if he does not do so, but elects to proceed upon one particular cause, he is deemed to have waived the other causes enumerated. For instance, if he elects to proceed upon the theory that the person declared elected was not at the time of the election eligible to such office (subd. 2, sec. 2010), he cannot be heard to urge in this court for the first time that he has mingled with his allegations others under which he should be permitted to show that illegal votes, for instance, were counted for the successful candidate, or that the successful candidate had been guilty of any of the criminal practices enumerated in subdivision 3.

The evident purpose of the statute is to afford to the person whose election is contested precise information of the particular cause or ground of contest. The ground selected in this instance is malconduct on the part of the election judges, as specified in subdivision 1. In attempting to enumerate the particulars of such malconduct, it is alleged that they received and counted for the contestee, Kerr, illegal votes—votes cast at a precinct within an Indian reservation, and at a polling place established at an Indian agency. But in making the reception of illegal votes a separate ground of contest, the legislature particularly excepted such cause from the definition of malconduct on the part of the judges of election, and the distinction between these grounds of contest is emphasized by section 2015 of the Code of Civil Procedure, which provides that when the reception of illegal votes is urged as cause of contest,

the contesting party cannot give any testimony relative thereto unless he delivers to the opposite party at least three days before the trial, a written list of the number of illegal votes and by whom given, which he intends to prove on the trial, and no testimony can be received of any illegal votes except such as are specified in such list.

To say that the reception of illegal votes may be classed as malconduct on the part of the judges of election, would be to nullify subdivision 4 of section 2010 above; while an elementary rule of statutory construction requires that this court shall give meaning to every statutory provision, if possible; and in order to carry that rule into effect it is necessary for us to say that malconduct on the part of the judges of election, mentioned in subdivision 1 above, must of necessity consist of acts entirely separate from the reception of illegal votes, which is made a distinct ground of contest.

Therefore, in this instance, the contestant having elected to proceed upon the ground of malconduct on the part of the judges of election, we may not inquire whether or not facts and circumstances of an entirely different character from those selected as the basis for this ground of contest in fact existed. The question as to whether the votes cast at Poplar precinct were illegal, under section 1245 of the Political Code, is not therefore before us. The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY CONCURS.

MR. JUSTICE MILBURN: I dissent. I am much inclined to the opinion that the votes cast at Poplar should have been thrown out at the trial of the contest. The statement of the contestant is not such as a careful lawyer should have drawn, but I think it is fairly implied therein that one of the grounds of the contest was "on account of illegal votes." (Code of Civil Proc., sec. 2010, subd. 4.)

It is true that section 2015 requires that the contestant at least three days before the trial shall deliver to the opposite party a written list of the number of illegal votes and by whom given, which he intends to prove on the trial. But I think

the statement made the point, lamely perhaps, that *all the votes* cast at Poplar on the Indian reserve were illegal, although it is stated in a mass of matter coming after the designation of misconduct of the judges as grounds of contest. Does not this make it certain as to what votes and voters were attacked? Was not the object of the requirement of notice fully attained? The poll-books and ballots made it all clear, and they were to be had at least three days before the trial. The object is to prevent surprise to the contestee as to which of the votes and voters the contestant refers.

In my opinion all of the proceedings in and about the election at Poplar—all being within the Indian reserve—were illegal and void. If the votes there cast had been thrown out, Mr. Kerr would not have had a majority, and his opponent would have been declared elected.

It is difficult, on the papers in this case, to decide, but, for the reasons given by me above, I am inclined to the belief that the opinion of the majority of the court is erroneous and that the correct conclusion has not been reached.

STATE, RESPONDENT, v. LEE, APPELLANT.

(No. 2,220.)

(Submitted November 6, 1905. Decided November 17, 1905.)

*Criminal Law—Prosecuting Witness—Variance in Name—
Idem Sonans.*

1. Defendant was convicted of the crime of robbery. The information stated the name of the injured person as "Frank Rex," whereas his own testimony showed that it was "Frank Röck." There was not any showing that he was named, or had been known as, Frank Rex. *Held*, that, the names being unlike in sound or spelling, and the information having failed to disclose any description which made it at all certain that "John Rex" and "John Röck" were one and the same person, the variance was fatal to conviction.

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

33	203
34	586
33	203
41	406

MARION LEE was convicted of robbery. He appeals from the judgment of conviction.

Mr. Albert J. Galen, Attorney General, and *Mr. W. H. Poorman*, Assistant Attorney General, for Respondent.

The pronunciation of the words "Rex," "Rock" and "Roeck" are so similar that they cannot be distinguished except by the most practiced ear. The information complies with all the requirements of section 1834, Penal Code, in that it is direct and certain as to party, offense, circumstances and amount. The evidence is to the effect that Rex, Rock and Roeck are the same person.

The principal reason for requiring the name of the injured party to be stated is to protect the defendant from another prosecution for the same offense. But when all the facts and circumstances surrounding the offense are stated and proven with such particularity and detail as in this case, an error in alleging the name is harmless. (*People v. Potter*, 35 Cal. 110.)

Messrs. Maury & Hogevoell, for Appellant.

The conviction for the robbery of Frank Rex is not a bar to a prosecution for the robbery of Frank Roeck or Frank Rock, as the name is pronounced in German. The variance was fatal. The verdict was against the instruction, which charged the jury that there must be evidence of robbery of Frank Rex. Rex and Rock are not *idem sonans*. The attentive ear finds no difficulty in distinguishing the two names Rex and Rock. The rule is stronger in criminal cases than in civil. (*Bill and Bull*, *Bull v. Traynham*, 3 Rich. (S. C.) 433; *Bolling and Bowling*, *Commonwealth v. Kearns*, 1 Va. Cas. 109; *Brisson and Prison*, *Pennsylvania v. Huffman*, Addis. (Pa.) 141; *Bronson and Brunson*, *State Bank v. Drovers*, 58 Ill. App. 396; *Brow and Brown*, *Brown v. Marqueze*, 30 Tex. 77; *Bryan and Bryant*, *Weidemier v. Bryan*, 21 Tex. 428; *Cobb and Cobbs*, *Jacobs v. State*, 61 Ala. 448; *Cousin and Cozen*, *Marriol v. Mascol*, *Anderson Rep.* 212; *Carney Griffie and Carney*

Griffien, *State v. Griffie*, 118 Mo. 188, 23 S. W. 878; Humphrey and Humphreys, *Humphrey v. Whitten*, 17 Ala. 30; Jeffery and Jeffries, *Marshal v. Jeffries*, Hempst. Rep. 299; Mathews and Mather, *Robson v. Thomas*, 53 Mo. 582; Nellie Ragley and Nellie Ragslie, *Mindax v. State* (Tex. Cr. App.), 38 S. W. 995; Redmond and Redman, *Pecham v. Stewart*, 97 Cal. 147, 31 Pac. 928; Rodgers and Rodger, *McDonald v. Rodger*, 9 Grant Ch. 75.)

MR. JUSTICE MILBURN delivered the opinion of the court.

This case is before us on appeal from a judgment of conviction for the crime of robbery. The defendant was informed against by the county attorney in and for the county of Silver Bow, being charged with having committed the crime of robbery in that he did willfully, etc., take certain moneys from the possession and person of one Frank Rex, etc. The testimony of the prosecuting witness clearly showed that his name was Frank Röck. There is not one word of testimony showing or tending to show that the injured person was named, or had been known as, Frank Rex. The point was made and preserved below that there was a fatal variance. This point is now before us for decision.

Section 1838 of our Penal Code is as follows: "When an offense involves the commission of, or attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material." In *State v. Sullivan*, 9 Mont. 490, 24 Pac. 23, a like section, 189, of the Criminal Practice Act (Comp. Stats. 1887) was considered by this court. The defendant in that case pleaded a former acquittal of the same offense. The person injured was described in the indictment as "John Maze." In a former indictment, upon which he had been acquitted, the person said to have been by him injured was named as "John Moys." The court held that as the surnames were not alike in sound or in spelling, and the offense was not described with sufficient

certainty in other respects to identify the act, the variance was material, and the former acquittal was not a defense to the second prosecution.

We do not find any description in the information which tends to make it sufficiently certain, or at all certain, that John Rex and John Röck are one and the same person. The names are not of the same sound. In the light of what is said in the case of *State v. Sullivan*, and for the reason above stated, we find the court was in error. The variance was fatal to conviction. The judgment must be and is reversed and the cause is remanded for a new trial. It is not necessary to consider the other points raised in the briefs.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

33	208
134	188
134	402
33	208
134	84

HENSLEY, APPELLANT, v. CITY OF BUTTE ET AL., RE- SPONDENTS.

(No. 2,178.)

(Submitted November 11, 1905. Decided November 24, 1905.)

Municipal Corporations—Taxation—Improvement Districts— Illegal Levy—Remedies—Equity—Practice.

Practice—Objection to Introduction of Evidence—Effect.

1. An objection to the introduction of any evidence confesses, for the purposes of the objection, the truth of the allegations of the complaint which are sufficiently pleaded.

Cities—Special Improvements—Taxation—Levy—When Void.

2. Taxes levied by a city for special improvement purposes are absolutely void, where the city council proceeds to create an improvement district, notwithstanding owners representing more than one-half of the area of the property to be assessed to defray the cost of such improvement, appear before it and object to the final adoption of the resolution creating the district for the purpose indicated.

Cities—Special Improvements—Taxation—Void Levy—Remedies.

3. Where a tax levied by a city for special improvement purposes was manifestly void under all circumstances and not merely "ir-

regularly levied or demanded," the remedy provided by Political Code, sections 4024-4026, is not exclusive, but the aid of a court of equity by way of injunction may be invoked to restrain the collection of such tax.

Appeal from District Court, Silver Bow County; George M. Bourquin, Judge.

ACTION brought by Lavinia Hensley against the City of Butte and Ben E. Calkins, treasurer. From an order vacating a temporary restraining order and refusing an injunction *pendente lite*, plaintiff appeals.

Mr. Lewis P. Forestell, Mr. John F. Davies and Mr. Edwin M. Lamb, for Respondents.

Under the holding in *Western Ranches v. Custer County*, 28 Mont. 278, 72 Pac. 659, following *Western Ranches v. Custer County*, 89 Fed. 577, it is extremely difficult to conceive how the lower court could otherwise rule than that plaintiff had an adequate remedy for her case at law—an adequate remedy at law necessarily barring relief in equity.

It is altogether a matter of legislative will whether differences arising over taxes between a municipality and a taxpayer shall be determined by an action at law or by a suit in equity. Each court must construe the statutes of its own state to determine such legislative will.

Apparently, a void special assessment, under the Utah statutes, may be reached by a suit in equity, for, as the court says in *Armstrong v. Ogden City*, 12 Utah, 476, 43 Pac. 121, "the whole field of equitable relief was open to them (special taxpayers)." But the statutes of Minnesota will not permit a special taxpayer to resort to equity to determine an illegal assessment. (*Fajder v. Village of Aitkin*, 87 Minn. 445, 92 N. W. 332.) So, the Montana statutes, judicially construed, restrict the equitable field in the matter of taxes void for want of jurisdiction to unusual cases, where the court deems the legal remedy inadequate. (Pol. Code, sec. 4026.) Plaintiff, however, makes no claim that the remedy at law is inadequate in her case. There is no distinction between a general tax and a special assessment from the standpoint of remedy and collection.

(*Fajder v. Village of Aitkin*, 87 Minn. 445, 92 N. W. 332; *Webster v. People*, 98 Ill. 343; *Potwin v. Johnson*, 106 Ill. 532; *People v. Springer*, 106 Ill. 542; *Herhold v. Chicago*, 106 Ill. 547; *Schlierbach v. Pana*, 13 Ill. App. 382.) "The title, 'An Act to provide a system of revenue,' is broad enough to include provisions for special assessments." (*City of Omaha v. Hodgskins* (Neb.), 97 N. W. 346; *Wilson v. City of Auburn*, 27 Neb. 435, 43 N. W. 257.)

Sections 4024, 4025 and 4026 of the Political Code are embraced within a title styled "Revenue." Said sections comprise a statute entitled (judicially construed), "An Act providing a remedy for the unlawful levy and collection of public revenue." Said sections expressly direct the legal remedy to municipal taxes. House Bill No. 204, section 31 et seq., relating to improvements made on the installment plan, denominates the special assessment a tax, and provides that the total assessments shall be placed on subsequent tax-rolls and be collected in the same manner as other taxes, but nowhere provides nor intimates that courts shall distinguish as to remedy a special taxpayer's grievance from the grievance of a general taxpayer. No apparent reason exists for such distinction.

Messrs. McBride & McBride, and Mr. James E. Murray, for Appellant.

Before the city council can adopt a resolution or ordinance creating an improvement district or levy an assessment against any property in any so-called improvement district, they must first take the necessary step under the law to obtain jurisdiction. It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers and no others: 1. Those granted in express words. 2. Those necessary to, or fairly implied in, or incident to the powers expressly granted. 3. Those essential to the declared object or purpose of the corporation not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied. (1 Dillon on Municipal Corporations,

secs. 89, 91. See, also, *Mulligan v. Smith*, 59 Cal. 229; *In re Bonds of Madera Irr. Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106, 28 Pac. 281, 14 L. R. A. 755; *Armstrong v. Ogden City*, 168 U. S. 224, 18 Sup. Ct. 102, 42 L. Ed. 444.)

There is a great difference between a tax levied by a county, under a state law, for purposes of public revenue, for the purpose of maintaining the government, and an alleged special assessment, demanded by a municipal corporation for an alleged special improvement. A "special assessment" is not a tax within the meaning of a constitutional provision exempting property from taxation. (*City of Butte v. School Dist. No. 1*, 29 Mont. 336, 74 Pac. 869; *Elliott on Roads and Streets*, 2d ed., sec. 549, and cases cited in *City of Butte v. School Dist. No. 1*, 29 Mont. 337, 74 Pac. 869; 2 *Cooley on Taxation*, pp. 1154, 1155.) A special assessment is certainly not a tax for public revenue in the ordinary sense in which the words "public revenue" are used. The ordinary and approved use of said words do not include special assessments.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was commenced in the district court of Silver Bow county by the plaintiff, Lavinia Hensley, against the city of Butte and the city treasurer to restrain them from selling certain real estate belonging to her, for taxes levied for special improvement purposes. The complaint, among other things, alleges that the plaintiff owned the property in controversy; that on March 1, 1899, the city council of Butte passed, for publication, council resolution No. 231 creating special improvement district No. 3, defining its boundaries and including plaintiff's property therein, stating the purpose for which the district was created, and fixing March 8, 1899, as the time when, and the council-room the place where, interested parties might appear and object to the final adoption of the resolution; that at such last-named time and place this plaintiff and other owners, representing more than one-half of the area of the property to be assessed to defray the cost of such improvement, did appear be-

fore the city council and did object to the final adoption of the resolution and to the making of such improvement; but notwithstanding this objection the city council assumed to pass finally such resolution, and thereby assumed to create such district, and afterward by resolution assumed to levy and assess against plaintiff's property a tax of \$465.06, and, the same not having been paid, the city treasurer advertised her property for sale and will, unless restrained by the court, proceed to sell the same. A temporary restraining order and an order to show cause why an injunction *pendente lite* should not issue, were issued and served.

The defendants answered specifically denying that the plaintiff or any of the property owners appeared before the city council and objected to the final adoption of the resolution, or to the creation of the improvement district, admitting some of the allegations of the complaint and denying others. Upon the hearing on the return of the order to show cause the plaintiff offered evidence in support of the allegations of her complaint which were put in issue. An objection was made by the city attorney to the introduction of any evidence by the plaintiff, upon the ground that she has a plain, speedy, and adequate remedy at law, under sections 4024, 4025, and 4026 of the Political Code, and therefore is not entitled to relief in equity. This objection was sustained, the temporary restraining order vacated and an injunction *pendente lite* refused. From the order so made the plaintiff appeals.

There is but one question presented which requires consideration. The objection to the introduction of any evidence confessed, for the purposes of the objection, the truth of the allegations of the complaint which were sufficiently pleaded. The allegation in the complaint is, that the plaintiff and other owners, representing more than one-half the area of all the property which would be assessed to defray the cost of said improvement, did appear before the city council at the time and place mentioned in the notice, and "objected to the making of said improvements." We think this allegation sufficient, and, being so, and the truth of it being admitted for the purposes of

the objection made, it is apparent that the city council had no authority to proceed to finally pass the resolution or to levy or attempt to collect the tax, and that such tax so levied was absolutely void under any circumstances.

The city council assumed to proceed under the provisions of House Bill No. 204, approved March 8, 1897 (Session Laws, 1897, p. 212), section 31 of which, among other things, provides: "If at such meeting, objections are made to the making of such improvement, by owners, or agents representing more than one-half in area of all the property which would be assessed to defray the cost of said improvement, the improvements shall not be made at that time, and at no time during a period of six months thereafter."

Assuming that the same rule of law is applicable to an assessment for special improvements as applies to a general tax, the query is presented: Was the plaintiff's remedy at law exclusive, or could she properly invoke equitable relief by injunction? This identical question was lately before this court in *Montana Ore Purchasing Co. v. Maher*, 32 Mont. 480, 81 Pac. 13, and sections 4023, 4024, 4025, and 4026 of the Political Code were construed. This court there said: "A consideration of sections 4023 and 4026 leads us to believe that the phrase 'irregularly levied or demanded' was used by the legislature advisedly, and as prescribing the limits wherein the statutory remedy is exclusive, as distinguished from those cases of illegal taxes the collection of which may be restrained by injunction. In other words, if the action of the assessor or board of equalization was such that the tax complained of is manifestly void under any circumstances, injunction will lie to restrain its collection; but, if the error complained of is only an irregularity on the part of the assessor, the board of equalization, or the treasurer, which may be subject to explanation so as to cure the apparent defect, or, in other words, where the tax complained of is not necessarily void under all circumstances, then the remedy provided by sections 4024 and 4025, namely, payment under protest and an action to recover back is exclusive, except in those unusual cases mentioned in section 4026."

Applying that rule to the facts of this case, and it appearing that the assessment was void, plaintiff properly invoked the aid of equity, and the court erred in excluding testimony in support of the allegations of her complaint.

The order is reversed and the cause remanded for further proceedings.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

STATE EX REL. MATTHEWS, APPELLANT, v. TAYLOR,
JUSTICE OF THE PEACE, RESPONDENT.

(No. 2,173.)

(Submitted November 10, 1905. Decided November 24, 1905.)

Prohibition—Justice of the Peace—Jurisdiction—Action for Deceit.

1. Section 66 of the Code of Civil Procedure, enacted in pursuance of sections 21 and 22 of Article VIII of the Constitution, does not clothe justices of the peace, either expressly or impliedly, with power to try and determine actions for deceit.

Appeal from the District Court, Silver Bow County; Michael Donlan, Judge.

APPLICATION for writ of prohibition by the state on relation of William F. Matthews, against C. Taylor, justice of the peace for South Butte Township, Silver Bow County. From a judgment of dismissal plaintiff appeals. Reversed.

Mr. James M. Hinkle, for Respondent.

Appellant (defendant in the court below) did not demur to the complaint, to raise a question of jurisdiction. We contend that the failure to demur to the complaint for want of jurisdiction in the justice of the peace to try the cause, the petition

for a writ of prohibition was properly denied, and the court below committed no error, and if that is correct, then the only question appellant claims is involved in this appeal this court is not called upon to consider, and the ruling of the court below should be affirmed.

The complaint sets out and describes the contract and recites the misrepresentations of appellant to respondent, and after reciting the precaution of the respondent to protect himself by placing the notes in escrow, after that when appellant came to respondent to withdraw said notes from escrow, the complaint alleges: "And on the further statement by the defendant at the time, that he would see that no damage occurred to plaintiff by reason of any possible claims that might come against said property or machinery which might be due and unpaid prior to the purchase by plaintiff from the defendant of said property, and relying on all of said statements, etc., he was thereby induced to and did permit the defendant to withdraw said notes from escrow and transfer them to an innocent purchaser." It will thus be seen that there was a contract between the parties by which the appellant was permitted to withdraw said notes from escrow, and the consideration was that he would see that no damage occurred to respondent; therefore we contend that this action grows out of a contract, and we are seeking to recover the amount of damages which appellant impliedly agreed to pay. It is in effect a plain suit on contract.

Mr. Lewis P. Forestell, for Appellant.

If appellant misrepresented to Hastie a material matter; which Hastie had a right to rely upon, which was false, which Hastie believed to be true and did rely upon, and was induced thereby to buy the property mentioned in the complaint and to deliver his notes in payment; and that he sustained damages thereby,—then he would have a cause of action to the extent of his damage for the fraud and deceit practiced on him by appellant. (14 Am. & Eng. Ency. of Law, 2d ed., pp. 23, 59, and cases cited; *Butte Hardware Co. v. Knox*, 28 Mont. 111, 121, 72 Pac. 301.) The averments of the complaint are insuffi-

cient to constitute actionable fraud, but there can be no doubt that such is the character of the action the pleader intended to state. The gist of the action is the alleged fraud and deceit alleged to have been practiced by appellant upon the plaintiff, Hastie, and the object of the action is to recover damages therefor.

A justice of the peace has no jurisdiction for an action for fraud and deceit. Where the jurisdiction of justices is confined to actions *ex contractu* they have no jurisdiction of actions for damages or actions on the case. (18 Am. & Eng. Ency. of Law, 20, and cases cited.) "An action for fraud or deceit is an action on the case." (*Hart v. Tallmadge*, 2 Day, 381, 2 Am. Dec. 105; *Sharp v. Curtiss*, 15 Conn. 526; 21 Ency. of Pl. & Pr. 902.) The form of the action is made the test, whether contract or tort. (*Conn v. Stumm*, 31 Pa. St. 14.) "A justice of the peace has no jurisdiction of an action for fraud and deceit in obtaining note." (*Millheim Bkg. Co. v. Peifer*, 22 Pa. Co. Ct. 129; *Murphy v. Thall*, 17 Pa. Super. Ct. 500.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court. •

Prohibition. This proceeding was brought in the district court of Silver Bow county to restrain the defendant, a justice of the peace, from proceeding to try and determine a certain cause pending before him as such justice, entitled *Samuel Hastie, Plaintiff, v. William F. Matthews, Defendant*, for that the said justice has no jurisdiction of the subject matter thereof. Upon the hearing in the district court on the day fixed for the defendant to show cause under the alternative writ, the court dismissed the proceeding and entered judgment for defendant. This appeal is from the judgment.

The question submitted to the court is, whether the justice's court has jurisdiction of the subject matter of the action. The complaint filed in that court is voluminous, and vague and indefinite in its allegations; but if it states a cause of action at all, upon any theory, it states one for deceit of which the defendant was guilty in connection with the sale by him to plaintiff of an interest in a concentrator and machinery used therein

and a certain tailings dump, by reason of which the plaintiff suffered damage.

The civil jurisdiction of justices' courts, as was pointed out in *Oppenheimer v. Regan*, 32 Mont. 110, 79 Pac. 695, is limited by the Constitution (sections 21, 22, Article VIII) and by the provisions of the Code of Civil Procedure (section 66) enacted in pursuance thereof. In that case it was said: "Within the limitations prescribed by the Constitution, the legislature has power to confer jurisdiction upon justices' courts in any class of cases; but these courts, being thus constituted courts of special and limited jurisdiction, are without power to hear and determine any case when such power is not, specifically or by clear implication, conferred by the statute defining their powers."

We do not find in section 66, *supra*, any express or implied grant of jurisdiction to try and determine an action for deceit. While, so far as the provisions of the Constitution are concerned, the legislature might have granted the jurisdiction in question, it has failed to do so. Whether this omission was intentional or through oversight, it is not necessary for this court to inquire. It is sufficient for present purposes to say that it has not done so.

The wrong complained of by the plaintiff in the justice's court was done in connection with the contract of sale of the property, but the subject matter of the action is not the contract or the breach of it, but the wrong wrought by the deceit by reason of which the plaintiff suffered damage. The action is not one *ex contractu*, but *ex delicto*, and is not enumerated among the actions *ex delicto* of which the justice's court has jurisdiction. That court was, therefore, without power to proceed.

No question is made in this court as to whether the defendant has pursued the proper remedy. This feature of the case we have not considered.

The district court was in error in dismissing the application. The judgment is therefore reversed. *Reversed.*

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

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KEELY, APPELLANT, v. GREGG ET AL., RESPONDENTS.

(No. 2,143.)

(Submitted June 21, 1905. Decided July 29, 1905.)

Public Lands—Fraud—Rights of Parties—Appeal—Mortgages—Foreclosure—Adjustment of Equities.

Trusts—Fraud—Public Lands.

1. A trust cannot result in one of two persons for the benefit of the other, if they intended and agreed to obtain land from the government unlawfully and fraudulently; and the court, in such a case, in a suit between themselves as to the land, will leave the parties where it finds them.

Appeal—Questions Reviewable—Judgment not Appealed from.

2. Where a judgment of foreclosure subject to certain conditions was rendered against defendants, who did not appeal therefrom, the supreme court could not, on plaintiff's appeal from the part of the judgment imposing the conditions, consider whether the mortgage could be lawfully foreclosed in view of the invalidity of the contract out of which the conditions imposed by the lower court arose.

Mortgages—Foreclosure—Adjustment of Equities.

3. (On rehearing.) Where defendant and plaintiff's assignor had an accounting of all dealings between them, and defendant executed notes and a mortgage to secure the balance found due from him to his assignor, and it appeared, in a suit brought by plaintiff to foreclose the mortgage, that his assignor had held the record title to a separate tract of land not covered by the mortgage, in order to secure a sum which was afterward included in the accounting, and had agreed to convey such separate tract to defendant, but had not released such tract from its position as security, the court, in decreeing foreclosure, should adjust all equities arising out of the transaction, and require plaintiff, who had succeeded to his assignor's title to the separate tract, to convey such tract to defendant, on the payment by defendant of the sum which the separate tract was held to secure, or so much thereof as remained unpaid after foreclosure and settlement of the mortgage, together with interest, taxes, and assessments on such tract.

Public Lands—Fraud—Concealment of Equities—Rights of Parties.

4. (On rehearing.) The fact that a person perfecting the title to scrip land was acting as trustee for another, and that both he and his *cestui que trust* intended to conceal from the federal land office their true relations, does not preclude the enforcement of the trust, where all the facts were known to and considered by the government officials before issuing the patent, and the government knowingly and willingly conveyed the land to the trustee, leaving him and his *cestui que trust* to settle the equities between themselves in the courts after patent issued.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by Thomas Keely against Joseph O. Gregg and James M. Burlingame, Jr., intervener. From the judgment rendered, in so far as it was in favor of defendants, and from an order denying a new trial, plaintiff appeals. Modified and affirmed.

Mr. Fletcher Maddox, for Appellant.

The new matter in defendant's answer could not be made the basis of a counterclaim. The defendant pleads the new matter in his answer as a "further defense and by way of cross-complaint and counterclaim." That the new matter does not in any sense constitute a defense would seem to require no argument. In order that new matter may constitute a defense it must defeat the plaintiff's case by the allegation of facts which show that notwithstanding the case alleged by the plaintiff, he has no right of recovery. The answer in the case at bar is merely an attempt to state an independent cause of action which the defendant might have presented had the plaintiff not commenced his suit. It in no way affects the plaintiff's cause of action. The use of the word "cross-complaint" is merely surplusage. Under the Montana Code no provision is made, as in California and some other states, for a cross-complaint, as such, but the rights of a defendant to affirmative relief are governed by the provisions of the statute in respect to counterclaims. (Code of Civil Proc., sec. 691.) Defendant's judgment on his counterclaim does not reduce or lessen this recovery, i. e., the judgment, by a single dollar. He seeks nothing more than to block the enforcement of this recovery by a demand which arises out of a different transaction from that set forth in the complaint. "A counterclaim when established must in some way qualify or must defeat the judgment to which the plaintiff is otherwise entitled." (*National Fire Insurance Co. v. McKay*, 21 N. Y. 191, 195; *Mattoon v. Baker*, 24 How. Pr. 329; *Waddell v. Darling*, 51 N. Y. 327, 330.) The result of defendant's counterclaim as allowed is that we have in one action a separate, independent judgment in favor of Keely against Gregg, and an-

other separate, independent judgment in favor of Burlingame and Gregg against Keely, neither of which judgments can be in any manner applied in diminution of the other.

One judgment alone is contemplated by the Code (Code of Civil Proc., secs. 1000, 1001), except where a several judgment is proper against several defendants (sec. 1002; see, also, Pomeroy's Remedies, sec. 747). Again, the defendant's so-called counterclaim is open to the objection that this alleged cause of action does not arise out of the contract or transaction set forth in the complaint. (Pomeroy's Remedies, sec. 752; Pomeroy's Code Remedies, sec. 163; *Bradley v. Thompson Smith's Sons*, 98 Mich. 449, 39 Am. St. Rep. 565, 57 N. W. 576, 23 L. R. A. 305; *Benham v. Connor*, 113 Cal. 168, 45 Pac. 258; *Stadler v. First Nat. Bank*, 22 Mont. 211, 213, 214, 74 Am. St. Rep. 582, 56 Pac. 111; *Raymond v. Hogan*, 159 N. Y. 548, 54 N. E. 1094; *Harrisburg T. Co. v. Shufeldt*, 87 Fed. 669.) Again, the defendant's so-called counterclaim must be rejected because it does not exist in favor of the defendant pleading to it. "The defendant cannot set up and maintain as a valid counterclaim a right of action subsisting in favor of another person, even though there may be close legal relations between himself and such other person." (Pomeroy's Remedies, secs. 740, 749; *Hook v. White*, 36 Cal. 299; *Le Claire v. Thibault*, 41 Or. 601, 69 Pac. 552; *Rensberger v. Britton*, 31 Colo. 77, 71 Pac. 379; *Sugden v. Magnolia Hotel Co.*, 58 App. Div. 236, 68 N. Y. Supp. 809; *Glide v. Kayser*, 142 Cal. 419, 76 Pac. 50; *Meyer v. Quiggle*, 140 Cal. 495, 74 Pac. 40; *Isenburger v. Hotel Co.*, 177 Mass. 455, 59 N. E. 120.) The plaintiff's objections to the introduction of any evidence in support of the defendant's so-called counterclaim should have been sustained.

As to the question of the competency of J. O. Gregg to testify to the agreement resting in parol between himself and Kendall, by which Gregg sought to show that a part of the consideration for the notes and contract was the promise of Kendall made at and before the delivery of the notes to recon-

vey the Lakey eighty, we contend that the consideration stated in the written contract is contractual in its nature and therefore cannot be altered or varied in any manner by parol testimony any more than the provisions of the contract that the conveyance of the real estate was to secure the payment of the notes. (*Baum v. Lynn*, 72 Miss. 932, 18 Sonth. 428, 30 L. R. A. 441; *Reisterer v. Carpenter*, 124 Ind. 30, 24 N. E. 371; *Looney v. Rankin*, 15 Or. 617, 16 Pac. 660; *Langan v. Langan*, 89 Cal. 186, 26 Pac. 764; *Freeman v. Freeman*, 68 Mich. 28, 35 N. W. 897; *Hubbard v. Marshall*, 50 Wis. 322, 6 N. W. 497; *Coon v. Knapp*, 8 N. Y. 402, 59 Am. Dec. 502; *Hendrick v. Crowley*, 31 Cal. 471; *Warbasse v. Card*, 74 Iowa, 306, 37 N. W. 383; *Tennessee R. Co. v. East A. Ry.*, 73 Ala. 426; *Davis v. Gann*, 63 Mo. App. 425; *Mattison v. Chicago etc. Ry.*, 42 Neb. 545, 60 N. W. 925.) "Equity aids the vigilant, and not those who slumber on their rights." (*Neppach v. Jones*, 20 Or. 491, 23 Am. St. Rep. 147, 26 Pac. 569, 849.) Laches is passiveness with knowledge. (*McCartin v. Traphagen*, 43 N. J. Eq. 323, 11 Atl. 156; *Wilkson v. Sherman*, 45 N. J. Eq. 413, 18 Atl. 228; *Perkins v. Lain*, 82 Va. 59. See, also, *Burling v. Newlands* (Cal.), 39 Pac. 49; *Lenox v. Harrison*, 88 Mo. 491; *Green v. Dietrich*, 114 Ill. 636, 3 N. E. 800; *Chapman v. Bank of California*, 97 Cal. 155, 31 Pac. 896; *Bell v. Hudson*, 73 Cal. 285, 2 Am. St. Rep. 791, 14 Pac. 791; *Hammond v. Wallace*, 85 Cal. 522, 24 Pac. 837; *Burkle v. Levy*, 70 Cal. 250, 11 Pac. 643; *Neppach v. Jones*, 20 Or. 491, 23 Am. St. Rep. 145, 26 Pac. 569, 849; *Brown v. Massey*, 138 Mo. 519, 38 S. W. 939; *Ketcham v. Owens*, 55 N. J. Eq. 344, 26 Atl. 1095; *Harrigan v. Smith* (N. J. Ch.), 40 Atl. 13; 12 Am. & Eng. Ency. of Pl. & Pr., p. 828 et seq.; 2 Pomeroy's Equity, secs. 817, 965; 1 Wood on Limitations, p. 141, notes 7, 8; p. 149, note 2; p. 151, notes 3, 4.)

Messrs. Walsh & Newman, for Respondents.

Counsel for appellant makes his argument solely upon the proposition that the new matter was pleaded only as a counterclaim. Matter may be pleaded as a defense or counterclaim,

and may be pleaded as both defense and counterclaim. In this action it was pleaded as a defense to the enforcement of the claims of the plaintiff. It showed a failure, or at least a partial failure, of consideration, and until the plaintiff fulfills all the terms of the contract of his grantor, it would be inequitable to permit him to enforce the claim against the defendant and retain the land that his grantor agreed to reconvey to the defendant. As a counterclaim, the case comes within the provisions of our Code. But if it did not come within the provisions of the Code, the court, as a court of equity, would allow the setoff. Courts of equity are not bound by the strict rules of law on the subject of setoff or counterclaim. They do not administer justice by halves, and when they have all the parties before them, will make a decree, settling the rights of all parties, and prevent further litigation and multiplicity of suits, and prevent one party from getting an advantage over the other. (*Hobbs v. Duff*, 23 Cal. 596.)

The right of setoff in chancery exists, independent of the statutes of setoff, and is not subject to them. (*Jeffries v. Evans*, 45 Ky. (6 B. Mon.) 119, 43 Am. Dec. 158; *Blake v. Langdon*, 19 Vt. 485, 47 Am. Dec. 701; *Spear v. Day*, 5 Wis. 193; *Naglee v. Palmer*, 7 Cal. 543.)

It is alleged in the answer that the promise of Kendall to execute the declaration of trust and agreement, was a part of the consideration for the notes, agreement and mortgage in issue in this case. It is contended parol evidence cannot be introduced because the contract is in writing. It is alleged that the contract is imperfect, and does not contain all the agreements, thus putting that matter in issue and admitting parol evidence. (Code of Civil Proc., sec. 3132, subds. 1, 2, sec. 3136.)

The parol evidence offered does not vary or contradict the written instrument. It only explains and shows a further consideration. Oral evidence may be introduced to show that the contract is incomplete and supplied the defect. (*Sivers v. Sivers*, 97 Cal. 518, 32 Pac. 571; *Gundry v. Green*, 95 Cal.

630, 30 Pac. 786.) The oral agreement of December 18, 1893, independent of the agreement of April 22, 1889, is sufficient to establish the trust. A trust may be established by parol. (*Bayles v. Baxter*, 22 Cal. 575; *Fulton v. Jensen*, 99 Cal. 590, 34 Cal. 331; *Hidden v. Jordan*, 21 Cal. 92; *Riley v. Martinelli*, 97 Cal. 580, 33 Am. St. Rep. 209, 32 Pac. 579; *Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; *Brison v. Brison*, 90 Cal. 223, 27 Pac. 186; *Snider v. Johnson*, 25 Or. 328, 35 Pac. 846. See, also, *Michael v. Foil*, 100 N. C. 178, 6 Am. St. Rep. 577, 6 S. E. 264; *Manning v. Jones*, Busb. L. (44 N. C.) 368; *Troubridge v. Wetherbee*, 11 Allen, 361; *Sherrill v. Hagan*, 92 N. C. 345; *Bedford v. Graves*, 8 Ky. Law Rep. 262, 1 S. W. 534; *Groff v. Hansel*, 33 Md. 163; *Applegarth v. Robertson*, 65 Md. 463, 4 Atl. 896; *Withers v. Greene*, 9 How. 230, 13 L. Ed. 116; *Whitney v. Allaire*, 4 Denio, 554; *Stufflebeem v. Arnold*, 57 Cal. 11.) We plead as a defense want of consideration by failure of Kendall to perform his oral agreement. This does not alter or in any way modify the contract which Gregg executed. When Kendall's contract to reconvey the Lakey land is performed, then the contract for the payment of the notes and enforcing the security against the land conveyed by his deed of December 18, 1893, can be enforced without change or modification.

“Equity will not refuse relief because of the lapse of time, unless a period equal to the statute of limitations has expired.” (*Chapman v. Lee*, 64 Ala. 483; *Supervisors of Henry Co. v. Winnebago etc. Drain Co.*, 52 Ill. 454; *Murphy v. Blair*, 12 Ind. 154.)

MR. JUSTICE MILBURN delivered the opinion of the court.

Appeal of the plaintiff from an order overruling a motion from a new trial and from that part of the judgment which is in favor of the defendants.

Defendant Gregg, on the 18th day of December, 1893, made and delivered to one Kendall his four promissory notes for

\$5,000 each, and to secure the same he and his wife made a deed to Kendall of certain lands and town lots, it being expressly understood, as per contemporaneous written statement, signed and acknowledged by Kendall and Gregg, that upon the payment of the notes the property should and would be reconveyed by Kendall to Gregg. Among other things, it is recited in the contemporaneous instrument: "Whereas, the said Lucius P. Kendall and said Joseph O. Gregg have this day accounted together concerning all dealings of every kind, character and description heretofore had between them, * * * and it has been ascertained and determined by said parties that the said Joseph O. Gregg is now indebted to said Lucius B. Kendall in the sum of \$20,000, * * * and is at present unable to pay or discharge said indebtedness, but in order to secure the payment of said indebtedness and interest thereon, * * * has caused to be conveyed to said Lucius B. Kendall the following described lands: * * *" It was agreed, as stated in said instrument, on the part of Kendall, that he would reconvey as stipulated upon the payment of the indebtedness. Kendall had assigned and conveyed to the plaintiff herein all his interest in the notes, mortgages, lands, and all his rights under said contemporaneous agreement. This suit was brought on default of payment of the notes to foreclose the mortgage, for such the deed appeared and was intended to be.

Defendant Gregg answered, and admitted the above alleged facts, but in defense set up what he calls a "counterclaim"; that is to say, he, while admitting that he has not paid any of the money secured in the manner above stated, avers that plaintiff holds the record title to a certain piece of land called the "Lakey tract," not mentioned in the mortgage or in the contemporaneous instrument referred to, and that it was part of the consideration of his (Gregg's) executing the mortgage that he (Kendall) was thereafter to make in writing, sign and deliver to him an agreement or promise to convey to him the Lakey tract. In the contemporaneous agreement heretofore mentioned, there is stated a second consideration for making the mortgage, to-wit,

the withdrawal by Kendall of all objections on his part theretofore made by him to a certain decree of partition of certain lands. There is not any mention in the mortgage or in the said contemporaneous agreement of any promise or obligation of Kendall to convey to Gregg the Lakey land. "All dealings" are settled, but no mention is made of the Lakey land matter. Part of this Lakey tract had meantime been conveyed to Burlingame, one of the defendants herein, by Gregg. Burlingame intervened.

On the trial evidence was introduced by Gregg, over the objection of plaintiff, in support of his counterclaim. The position of Gregg is that his averments as to the Lakey land matter constitute a defense as going to show that the consideration of the mortgage failed, in part at least, for that Kendall never did sign and transmit to him the written agreement to convey the Lakey tract to him, and in fact refused to do so, and has failed to convey the same, and that the averments constitute also grounds of a counterclaim.

The court found and adjudged in favor of defendant Gregg as to the counterclaim, and ordered the conveyance of the Lakey tract to him, but seems originally to have failed to require reimbursement of plaintiff by the defendant of taxes and assessments made on the land and paid by the plaintiff and his predecessor.

It is alleged by Gregg that Kendall never intended to carry out the promise to convey the Lakey tract to him, and that the making of the promise to convey without then and there intending to perform was actual fraud. (Civil Code, subd. 4, sec. 2117.) Judgment went for the plaintiff on the mortgage, with adjudication as to the counterclaim, which we have mentioned above. Afterward the court, after hearing the motion of plaintiff for a new trial, conditionally granted the same, unless the defendants would consent to a modification to the effect that they should pay certain taxes and assessments. To this they assented, and, having performed, the motion for new trial was then denied. Neither of the defendants appeals.

The defendants not making an attack upon the judgment by appeal therefrom, we have only the appeal of the plaintiff before us. This appeal is resisted by the defendants; in other words, they wish the case to stand as it is—that is, they are willing that the mortgage shall be foreclosed according to its terms, but they demand that the Lakey land be conveyed to Gregg. It does not make any difference in this case whether the evidence as to the Lakey property goes to the want of consideration in part for the mortgage and mortgage notes, or whether it is a matter of counterclaim. It is not necessary for us to remark upon the position taken by counsel that the Lakey land matter is a matter of counterclaim. It undoubtedly, judging from the record, was the intention of Kendall and Gregg to get title to said Lakey land from the government without disclosing to the United States general land office that Gregg, and not Kendall, was the purchaser of certain scrip, and the claimant of the land taken thereunder. Scrip had been bought by Gregg with money borrowed from Kendall. The scrip was put upon the Lakey land. It turned out to be fraudulent in that the alleged soldier to whom it had been issued was not entitled to the same. Meanwhile the scrip had been put upon the land by the attorney in fact of Gregg, and the land conveyed to Kendall by the attorney in fact by order of Gregg, and with the consent of Kendall. It is alleged by Gregg that Kendall held the land as security for money owing by the former. Kendall, finding that the scrip was worthless, appears from the record in the land office, in evidence, to have proceeded under the Act of Congress of August 18, 1894 (U. S. Comp. Stats. 1901, p. 1417), making certain scrip “valid in the hands of *bona fide* purchasers for value,” and saying that “all entries heretofore and hereafter made with such certificates by such purchasers, shall be approved, and patent shall issue in the name of the assignee.” But it seems that the general land office, differing with the local land office, held the Act of March 3, 1893 (U. S. Comp. Stats. 1901, p. 1416), to apply, it declaring that, “where soldier’s additional homestead entries have been made or initiated upon

certificate of the commissioner of the general land office of the right to make such entry, and there is no adverse claimant, and such certificate is found erroneous or invalid for any cause, the purchaser thereunder, on making proof of such purchase, may perfect his title by payment of the government price for the land."

Kendall and Gregg labored under the mistaken idea that while Gregg, as he alleges, was the owner and purchaser of the scrip and the land taken up thereunder, Kendall could properly and lawfully make the necessary proofs that he was the purchaser of the scrip or of the land and procure patent. The record shows the fact that Gregg, and not Kendall, was the purchaser of the scrip and of the land upon which it was put, and that Kendall was acting not as the owner of the scrip or claimant of the land was by them intentionally kept carefully from the knowledge of the government. The patent went to Kendall.

Now, under these circumstances, Gregg contends that the mortgage judgment (from which he does not appeal) should not be enforced unless Kendall's assignee (the plaintiff) carries out what he (Gregg) declares was part of the agreement of December 18, 1893, to wit, the alleged promise to convey to him (Gregg) the Lakey eighty acres of land, which promise, if made, was deliberately left out of the written instrument of December 18, 1893. If, as we believe and hold, the contract between Kendall and Gregg to take the land from the government in the way agreed upon and above stated was invalid, then it does not make any difference whether Kendall intended at the time of the settlement of December 18, 1893, to make his promise to convey the Lakey tract or not. It was a promise which could not be enforced. A trust cannot result in one of two persons for the benefit of the other, if they intended and agreed to obtain land from the government unlawfully and fraudulently. In such a case, in a suit between themselves as to the land, the court will leave the parties where it finds them.

It is obvious from the admissions of the answer as to the making of the notes and mortgage, the averments as to the counterclaim, and the prayer of the answer, that the only question submitted by the defendant in the court below was: Shall the plaintiff be permitted to foreclose his mortgage without first conveying to Gregg the Lakey tract? This was the only issue tried. This issue was forced upon the plaintiff by the defendants, with the consent of the court, and it led the court erroneously to admit the testimony as to the Lakey tract over the objection of the plaintiff.

Defendants do not claim that the arrangement of Kendall and Gregg as to the Lakey tract was fraudulent, and do not say that the mortgage is void for any such reason. The appellant's position is that the Lakey tract matter had nothing to do with the mortgage, and he relies upon the writings of December 18, 1893, to support his assertion. In short, defendants say the mortgage is good and valid, and may be foreclosed, provided the plaintiff be ordered to convey to Gregg a certain tract of land which, as we hold, was gotten from the government contrary to law, and which defendants say plaintiff's assignor orally promised on December 18, 1903, to convey to Gregg.

We may not consider in this case, when there is no appeal from the judgment by the defendants, or any of them, whether or not the mortgage sued upon, if partly made in consideration of such or any promise of Kendall in relation to the Lakey tract, may be lawfully foreclosed.

It is not necessary for us to consider the point made by appellant that the contract *in writing* of December 18, 1893, covered *all dealings* between the parties. Whether it did or not, it is apparent, under the circumstances, that the defense or "counterclaim" of the alleged unfulfilled contemporaneous oral agreement of Kendall as to the Lakey tract may not, on this appeal, be considered by us as entering into or forming part of the consideration of the notes and mortgage.

The above being our view of the case on this appeal, after considering the oral arguments and reading the able brief of

each of counsel, we need not discuss or pass upon the other points of appellant in regard to laches, the statute of limitations, etc. As we have said, the court erred in admitting evidence relating to the supposed "counterclaim" or defense as to the Lakey matter. Objection was raised below on the trial, and the point of its admissibility either as a defense or as a counterclaim is squarely raised by the briefs submitted to us.

For the reasons above appearing, the court below is directed to modify its judgment by striking therefrom all reference to the north half of the southeast quarter of section 31, township 21 north, of range 4 east (the Lakey eighty acres). The appeal, therefore, of plaintiff from that part of the judgment referring to the Lakey land is sustained, the court having erred in making its conditional order overruling plaintiff's motion for a new trial, whereas it should have granted it, and subsequently, upon the performance of the condition, having denied the motion; but the judgment now being modified herein and hereby as above stated, there is not any reason why a new trial should be had, and therefore the court below is ordered to modify the judgment as above stated, and to let the same stand as the judgment of the court without a new trial.

Judgment modified.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing granted October 21, 1905.

ON REHEARING.

(Submitted December 4, 1905. Decided January 29, 1906.)

MR. JUSTICE MILBURN delivered the opinion of the court.

This case is before the court on rehearing, having been heretofore decided. For statement of facts and opinion see *ante*, p. 216, 82 Pac. 27. Our decision before was that the decree below should be modified by striking from it all refer-

ence to the Lakey eighty acres, which will be hereinafter called the Lakey land. After consideration of argument of counsel on rehearing, we now say that we erred in ordering the particular modification of the decree which we in the former opinion directed to be made.

The contemporaneous instrument of December 18, 1893, shows that the mortgage for \$20,000 was given to secure certain indebtedness, evidenced by four promissory notes of \$5,000 each, after an accounting as to all dealings between Kendall and Gregg. There is not any statement therein that there was made, or intended to be made, any release of the Lakey land held by Kendall as security for a certain sum of \$3,000, being on such accounting considered as part of the \$20,000, theretofore advanced by him to Gregg, or that the debt of \$3,000, or any part thereof, had been discharged in any way. The fact of this land being held as such security being set up by defendant Gregg in the equity suit to foreclose the \$20,000 lien on other property, we are now of the opinion that the court below was correct in attempting to adjust all the equities growing out of the whole transaction and in requiring Keely, the successor of Kendall, to convey the Lakey land to Gregg, but was not correct in directing Gregg to pay only the taxes and assessments on said land accrued, with interest, but should have added a further condition to be performed by Gregg, to-wit, to pay the \$3,000 and interest, or so much thereof as might remain unpaid after foreclosure and settlement of the \$20,000 mortgage.

Counsel for plaintiff and appellant admitted in open court on rehearing that he would not complain of such amendment of the decree.

It appears that the Lakey land was taken as security for the \$3,000. As the \$3,000 and interest item was included in the settlement of December 18, 1893, interest should be computed on \$3,000 from the date that the debt was incurred, to-wit, April 22, 1889, until December 18, 1893, at the then statutory rate, and at eight per cent upon the total of such \$3,000 and

interest from December 18, 1893, until the time of settlement or foreclosure of the \$20,000 mortgage. If upon such settlement of the foreclosure suit under the decree there be a deficiency or a balance still unpaid, thus leaving the \$3,000 and interest computed as aforesaid, or any part thereof, unpaid, then such sum of \$3,000 and such interest, or so much thereof as is unpaid by such foreclosure, shall, with the amount now reported by counsel to be deposited with the clerk for taxes and assessments on the Lakey land, be paid to Keely, and then the said Lakey land shall be by Keely, or the clerk of the court as commissioner, conveyed to Gregg.

Upon further reflection and after further examination we find that we were in error in this case, in our conclusion that because Kendall and Gregg apparently had intended to conceal from the federal land office the fact that Gregg, and not Kendall, was the purchaser under the scrip, any promise of Kendall to convey the land patented to him in pursuance of such secret plan, could not be enforced. It seems that the facts upon which we based our conclusion that the arrangement to procure title in Kendall, and not in Gregg, were all known and considered by the interior department before issuance of patent, and that the government knowingly and willingly conveyed the land to Kendall intentionally, leaving him and Gregg to settle the equities between themselves, if any there were, in the courts after patent issued. For this reason we revoke what was said in the former opinion as to the arrangement between the parties being void, and that the courts would not enforce the intended trust. It now appears that Kendall took the patent in his own name to secure the sum of \$3,000 and interest, and his successor should convey the same to Gregg whenever the amount for which it was held as security, such amount to be ascertained as hereinbefore said together with said taxes and assessments, is fully paid by or on behalf of Gregg.

Let the decree below appealed from be modified accordingly, and let the foreclosure of the \$20,000 mortgage proceed as decreed. Everything in the former opinion not in conformity

herewith is revoked. The decree, when amended as above decided, shall stand affirmed. *Remittitur* forthwith.

Modified and affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

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24 240

IN RE TUOHY'S ESTATE; SHIELDS ET AL., APPELLANTS, v.
PAUWELYN, EXECUTOR, RESPONDENT.

(No. 2,137.)

(Submitted October 3, 1905. Decided November 6, 1905.)

Probate Proceedings—Real Estate—Order of Sale—Jury Trial—Practice—District Courts—Probate Jurisdiction—Devises—Exemptions from Sale—Statute of Limitations—Adverse Possession—Executors—Laches—Briefs.

Probate Proceedings—Real Estate—Order of Sale—Jury Trial—Written Demand.

1. Where no written demand for a trial by jury had ever been filed (Code of Civil Procedure, sections 2340, 2923, 2940) by appellants, against whose objections an order, directing the sale of certain real estate, was made by the district court sitting in probate, a jury trial of the issues presented was properly denied; and a demand at the close of the written objections for a jury, which demand was not called to the attention of the court or judge until the hearing began, did not supply the omission.

District Courts—Probate Jurisdiction.

2. The district court sitting as a court of probate has only such powers as are expressly conferred upon it by statute, and such as are necessarily implied in order to carry out those expressly conferred.

District Courts—Probate Jurisdiction—Real Estate—Order of Sale—Title.

3. The district court when sitting in probate, on an application for an order of sale of real estate made under section 2871 of the Code of Civil Procedure, may not enter into an investigation of questions of title to property included in the order and alleged by objectors to the granting of such order to have been devised for a valuable consideration, and for that reason exempt from sale until after the disposition of all the other property belonging to the estate.

Probate Proceedings—Specific Devises—Exemptions from Sale for Debts of Estate.

4. Specific devises made for valuable consideration are not exempt from sale for the payment of the debts of the estate, pro-

vided for by section 1822 of the Civil Code; nor are the devisees entitled to have the sale of them postponed until other property specifically devised, no matter for what purpose, has been resorted to for the liquidation of such debts.

Probate Proceedings—Specific Devises—Sale—Payment of Debts of Estate.

5. Specific devises, whether made for charitable purposes, or for valuable consideration, fall within the fifth class enumerated in section 1822 of the Civil Code, and no distinction may be made among them, but all must be resorted to ratably for the payment of the debts of the testator, after the property falling in the first four classes has been exhausted for that purpose.

Probate Proceedings—Claims Against Estate—Statute of Limitations.

6. When claims have been presented and allowed and are not contestable because not presented in time (Code of Civil Procedure, section 2603), or because barred at the time of the presentation (*Id.*, section 2609), the statutory limitations do not run against them.

Probate Proceedings—Real Estate—Order of Sale—Adverse Possession.

7. The question of adverse possession as between an executor and a devisee may not be tried by the district court sitting as a court of probate, upon an application for the sale of real estate.

Probate Courts—Real Estate—Order of Sale—Laches.

8. *Quære*: May district courts, when sitting in probate, deny an order for the sale of real estate, where it appears that there has been such unreasonable delay in making the application as to amount to laches?

Probate Proceedings—Real Estate—Order of Sale—Laches.

9. Where it appeared, on an application to the probate court for an order of sale of real estate, that the estate had been involved in litigation until about a year before the application, and that appellants, who objected to the granting of the order, desiring that the property belonging to the estate and particularly that portion devised to them should not be sold, had encouraged the executor to make leases of mining claims belonging to the estate, a finding by the court that under all the circumstances there had been no unreasonable delay on the part of the executor in making the application was justified—assuming that the defense of laches could be invoked to defeat the application.

Probate Proceedings—Real Estate—Order of Sale—Findings—*Res Judicata*.

10. (On motion for rehearing.) A finding by a probate court, on an application by an executor to sell real estate, that the real estate, alleged to have been devised to applicants for a valuable consideration, belonged to the estate, was outside of its jurisdiction, since the question of title could not be inquired into by it, and such finding, being wholly immaterial and upon a subject outside of the purview of the application, may not be considered *res judicata*, upon affirmation of the order of sale by the supreme court.

Appeal—Errors—Briefs.

11. (On motion for rehearing.) Errors not assigned in the briefs of counsel will not be considered on appeal.

Appeal—Rehearing.

12. (On motion for rehearing.) The fact that the supreme court did not, on the original hearing, consider and decide a question not assigned in the brief and not properly before it, is not ground for rehearing.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

IN THE MATTER of the estate of James Tuohy, deceased, on application of Cyril Pauwelyn, executor, for an order to sell a portion of the real estate belonging to said estate. From an order directing such sale, Daniel Shields and Thomas McLaughlin appeal. Affirmed.

Mr. H. L. Maury, Mr. John B. Clayberg, and Mr. W. Y. Pemberton, for Appellants.

Devises, generally speaking, may be of two classes, viz., for value or upon a valuable consideration, or in bounty, depending entirely upon facts existing at the time of the making of the will, and the intention of the testator. Presumably the testator intends to pay his debts before he is generous. The intention of the testator must be gathered from the will, if possible, but if the will is entirely silent, then the intention of the testator may be shown by parol evidence. Such evidence does not contradict the will or add thereto, but simply gives expression of what the testator intended and supplies something omitted from the will. (Greenleaf on Evidence, sec. 287; *Williams v. Crary*, 8 Cow. 246; *Stephens' Digest of the Law of Evidence*, p. 162, and cases cited.)

If a devise or legacy is granted by the will upon a valid consideration, it cannot be charged either for the satisfaction of other devises or legacies, or for the payment of the debts of the decedent, or expenses of administration, until all the property covered by general legacies and devises has been applied, and by special legacies and devises, but not for a consideration, has been exhausted. (*University's Appeal*, 97 Pa. St. 199; *Howard v. Francis*, 30 N. J. Eq. 447; *Clayton v. Aiken*, 38 Ga. 320, 95 Am. Dec. 393; *Borden v. Jenks*, 140 Mass. 562, 54 Am. Rep. 507, 5 N. E. 623; *Farnum v. Bascom*, 122 Mass. 282; *Pollard v. Pollard*, 1 Allen, 490; *Richardson v. Hall*, 124 Mass. 228; *McLean v. Robertson*, 126 Mass. 537; *Wood v. Vanderborgh*, 6 Paige Ch. 277; *Duncan v. Franklin*,

43 N. J. Eq. 143, 10 Atl. 546; *Brown v. Brown*, 79 Va. 648; *Moore v. Alden*, 80 Me. 301, 6 Am. St. Rep. 203, 14 Atl. 199; *Rowe v. Lansing*, 53 Hun, 210, 6 N. Y. Supp. 777; *Locock v. Clarkson*, 1 Desaus. 476.)

May a trial by jury be claimed as a matter of right upon application to sell real estate in probate proceedings? If objections, filed to a petition for sale of real estate, raise equitable issues, such issues not being triable by a jury, at the time the constitution was adopted, no jury could be, of right, demanded. But if the objections to the petition raised legal issues of fact, triable by a jury prior to the adoption of the constitution, the objector would undoubtedly have the right to demand that such issues be tried by a jury. Section 2923 is very broad in its provisions. "All issues of fact joined in probate proceedings must be tried, etc."

As to the issues presented by the objections to the petition for the order to sell the real estate now before the court, we submit that some of such issues are legal in their nature and not equitable. The issue as to whether the objector had been for more than ten years in the adverse, open, notorious and exclusive possession of the one-fourth interest in the Tuolumne lode is clearly legal; the issue upon the pendency of the suit in a court of competent jurisdiction, and whether or not the devise to objector Shields was made upon a valuable consideration. These issues, all being legal issues of fact, were triable by a jury if one was demanded in accordance with the statute as a matter of right.

May the statute of limitations be made available to defeat an order of sale? In some of the states the statute of limitations is applied by the courts directly to a proceeding of this character. (*Riser v. Snoddy*, 7 Ind. 442, 65 Am. Dec. 740; *Cole v. Lafontaine*, 84 Ind. 446.) In other states an analogy to the statutes of limitations is followed, to-wit: Arkansas, Connecticut, Illinois, Iowa, Maine, Massachusetts, Michigan, Mississippi and New Hampshire. (Woerner on the American Law of Administration, sec. 465, and cases cited.) Others apply the statute of limitations in favor of the executors or ad-

ministrators, or statutes of nonclaim, requiring claims against the estates of deceased persons to be established within a certain time, after which they are forever barred. (Woerner on the American Law of Administration, sec. 465.) Still others apply the doctrine of laches on the part of the administrator or creditors in seeking to subject the real estate of a decedent to creditors' claims.

We believe that the decisions of the American courts on the subject of the application for an order of sale being opposed by reason of the statute of limitations or lapse of time, show the following propositions to be the law: (a) If there are statutory regulations as to the time in which proceedings may be instituted, to obtain an order of sale of real estate, such statutory provisions may be pleaded and relied upon, and must be recognized and enforced by the courts. (b) In the absence of statutory regulations as to the time, it is the duty of courts to determine what shall be considered a reasonable time in which the personal representative or creditors may apply for the order of sale and to refuse the application if the party applying comes too late. (c) In the absence of statutory regulations on the subject of time, the statutory time limiting the right of entry or right of action for the recovery of real estate is the correct analogy and only safe guide. This time commences to run when the executor first discovers, or has reasonable grounds to suspect, that the personalty is not sufficient to pay the debts of decedent and costs and expenses of administration. (d) If the application for the order of sale is filed after the statutory time for entry upon real estate or for suit to recover the same, the burden is upon the party applying, to excuse the delay and show that it is not due to negligence. (*Hadley v. Gregory*, 57 Iowa, 157, 10 N. W. 319; *Cresswell v. Slack*, 68 Iowa, 110, 26 N. W. 42; *State v. Probate Court*, 40 Minn. 296, 41 N. W. 1033; *Bishop v. O'Connor*, 69 Ill. 431; *Proctor v. Proctor*, 105 N. C. 222, 10 S. E. 1036; *Perry v. Peterson*, 98 N. C. 63, 3 S. E. 834; *Wingerter v. Wingerter*, 71 Cal. 105, 11 Pac. 853. See, also, *Ricard v. Williams*, 7 Wheat. 61, 5 L. R. A. 398;

Roth v. Holland, 56 Ark. 633, 35 Am. St. Rep. 126, 20 S. W. 521; *McCoy v. Morrow*, 18 Ill. 519, 68 Am. Dec. 578; *Wolf v. Ogden*, 66 Ill. 224; *Falley v. Gribbling*, 128 Ind. 110, 26 N. E. 794; *McCreary v. Tasker*, 41 Iowa, 261; *Waters v. Crossman*, 41 Iowa, 255; *Nowell v. Nowell*, 8 Me. 220; *Estate of Godfrey*, 4 Mich. 308; *Ferguson v. Scott*, 49 Miss. 500; *Hall v. Woodman*, 49 N. H. 295; *Ex parte Allen*, 15 Mass. 58; *Van Syckle v. Richardson*, 13 Ill. 171; *Estate of Crosby*, 55 Cal. 574.)

Whenever the question has been before the courts, it has universally been held that the probate court has no power to order a sale of real estate, the possession of which is held adversely to him, until he has regained such possession. (*Libbey v. Christy*, 1 Redf. (N. Y.) 465; *Hewitt v. Hewitt*, 3 Brad. 265; *In re Haas*, 97 Cal. 232, 31 Pac. 893; *Bozeman v. Bozeman*, 82 Ala. 389, 2 South. 732; *Bozeman v. Bozeman*, 83 Ala. 416, 3 South. 784.) In Georgia we find a statute prohibiting the sale of lands held adversely until they are again reduced to the possession of the administrator. (*Weitman v. Thoit*, 64 Ga. 11; *Hall v. Armor*, 68 Ga. 449.)

Mr. John J. McHatton, for Respondent.

A trial by jury may not be claimed as a matter of right upon application to sell real estate in probate proceedings. Trial by jury, which is preserved by the Constitution as a matter of right, is only trial by jury in such cases as, before the adoption of the Constitution, a party would have been entitled to, and an objector in a case of this kind was not entitled to a trial by jury. The power to determine the necessity for the sale of real estate is confined by the various provisions of the statute to the court or judge. Probate proceedings are statutory. They partake more of the character of equitable proceedings than of legal ones, and yet, under the statute, they are not equitable proceedings. The matters within the jurisdiction of the court which may be heard and determined upon an application to sell real estate determine in themselves that an objector is

not entitled to trial by jury. There is no issue raised by objectors. Filing replication to irrelevant objections did not raise material issues and could not work estoppel.

On an application for the sale of real estate, it may not be made to appear, either by objection or evidence in support of it, that a particular devise was made for a valuable consideration. In support of this, we need only bear in mind the limit of jurisdiction and determination which may be had in probate proceedings, as announced by this court in *State ex rel. Shields v. Dist. Court*, 24 Mont. 1, 60 Pac. 489, and *In re Barker's Estate*, 26 Mont. 279, 67 Pac. 941, and in several other instances.

It may not be made to appear by pleading or evidence that a particular devise was made for a valuable consideration for the further reason that the court, in probate proceedings, has no jurisdiction to determine title, or to determine any question with reference to priority between devisees other than what appears upon the face of the will, upon application of the statutes themselves. If, in any case, the question of devise for consideration might become material, it must be presented in a proper action, brought in equity. We need not discuss here whether any such action might have foundation. The question cannot be considered here. The will is plain and unambiguous. The court cannot construe a will upon application for sale of real estate. Besides, the terms of the will cannot be varied, and no oral testimony can be introduced to vary a will. (*Forbes v. Darling*, 94 Mich. 621, 54 N. W. 385; *Perea v. Barela*, 5 N. Mex. 458, 23 Pac. 766; *Phillips v. McCombs*, 53 N. Y. 494; *Keynolds v. Robinson*, 82 N. Y. 103, 37 Am. Rep. 555.)

"Probate or common-law tribunals cannot * * * remodel or construct a will to meet the special compact of the parties." (Schouler on Wills, sec. 453, citing *Shakespeare v. Markham*, 17 N. Y. Supr. 311; *Hand v. Hoffman*, 8 N. J. L. 71; *Timberlake v. Executors*, 35 Ky. 345; *Hall v. Hall*, 8 Rich. L. (S. C.) 407, 64 Am. Dec. 758.) The presumption that a legacy to a creditor is intended as a payment is an equitable

and not a legal proposition, and is only available in a court of equity. (Pomeroy's Equity Jurisprudence, secs. 521, 527, et seq.; *Cloud v. Clinkinbeard's Exrs.*, 8 B. Mon. (Ky.) 397, 48 Am. Dec. 397.)

The issue which may be heard and determined upon an application for sale of real estate is confined alone to the necessity. (Code of Civil Proc., secs. 2640, 2670, 2671; *Smith v. Smith*, 27 N. J. Eq. 445; *Clement v. Foster*, 71 N. C. 36.) Some of the things which may not be put in issue are: Contemporaneous agreements as to payment of debts. (*Proctor v. Proctor*, 105 N. C. 222, 10 S. E. 1036.) Questions of heirship; objections to the delay of settlement of the estate. (*In re Houch's Estate*, 23 Or. 10, 17 Pac. 461.) Disputes between heirs and third parties. (*Theller v. Such*, 57 Cal. 447.) Claims of paramount title. (*Shields v. Ashley's Admr.*, 16 Mo. 471.) Right to administer on an estate. (*Riser v. Snoddy*, 7 Ind. 442, 65 Am. Dec. 740; *Waldow v. Beemer*, 45 Neb. 623, 63 N. W. 918.) Adverse possession. (*Valle v. Bryan*, 19 Mo. 423; *Railway Co. v. City of New Orleans*, 52 La. Ann. 1831, 28 South. 311.)

No claim of statute of limitations may be made in this state. This for the reason that there is no statute of limitation with reference to a matter of this kind. But if there was a statute of limitations which could be claimed as in anywise applicable, it could not be interposed against an application to sell real estate. The court, on an application of this kind, has no jurisdiction to determine title, and the establishment of the statute of limitations is followed by the consequence of establishing title.

No adverse claim could be set up by objector or determined by the court in this proceeding. It is a well-settled rule of law that a purchaser at an executor's sale is bound by the rule of *caveat emptor*. (*Towner v. Rodegeb*, 33 Wash. 153, 99 Am. St. Rep. 936, 74 Pac. 50.) An adverse claim or possession does not prevent a sale. (11 Am. & Eng. Ency. of Law, 2d ed., p. 1094; *In re Walker's Estate*, 6 Utah, 369, 23 Pac. 930.) The court has

no power to entertain or determine an adverse claim. (*Stewart v. Lohr*, 1 Wash. 341, 22 Am. St. Rep. 150, 25 Pac. 457; *In re Singleton's Estate*, 26 Nev. 106, 64 Pac. 513; *In re Kimberly's Estate*, 97 Cal. 281, 32 Pac. 234; *Estate of Burton*, 64 Cal. 428, 1 Pac. 702; *In re Haas' Estate*, 97 Cal. 232, 31 Pac. 893; *In re Bolland's Estate*, 38 Or. 490, 63 Pac. 689; *Dickey v. Gibson*, 121 Cal. 278, 53 Pac. 704; *Estate of Burdick*, 112 Cal. 387, 44 Pac. 734; *In re Strong's Estate*, 119 Cal. 663, 51 Pac. 1078.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Appeal from an order of the district court of Silver Bow county directing a sale of real estate belonging to the estate of James Tuohy, deceased.

James Tuohy died on or about October 2, 1893, in Silver Bow county. His estate consisted of a small amount of personal property and certain real estate, chiefly undeveloped mining claims. He left a will which, after disposing of most of the estate by special bequests, closes with this clause: "I hereby appoint Cyril Pauwelyn, of Butte, sole heir and executor of this my last will and testament, without bonds." Cyril Pauwelyn, having qualified as executor under an order of the district court, entered upon the discharge of his duties and has continued therein. Soon after his appointment litigation arose involving the validity of claims against the estate to a large amount, sufficient, if established, together with the undisputed claims, to consume the entire estate. The last of this litigation was finally disposed of about March 25, 1903, the principal claim having been declared invalid.

On March 22, 1894, the executor filed his petition for an order to sell a portion of the real estate, alleging facts showing a necessity therefor. For some reason, doubtless because of the pending litigation and uncertainty as to the amount of funds necessary to pay claims, this petition was abandoned. Thereafter some of the mining claims were leased, with the expectation that a sufficient amount would be realized from roy-

alties upon ores extracted therefrom, to pay the debts and that a sale would not be necessary. The petition upon which the order now before us was made was filed on April 21, 1904. It appears therefrom that the personal property has been exhausted in the payment of expenses of administration, the principal part of which have been counsel fees and other disbursements in connection with the litigation referred to above. The debts chargeable against the estate as set forth therein amount to \$10,572.15. The charges for administration and other expenses already accrued and unpaid amount to \$4,845.-28. The executor states that he is unable to estimate the amount of charges and expenses yet to accrue "owing to the uncertainty of the time it will require to close up and settle said estate; the amount or amounts that may be realized from the sale or sales of property belonging to the said estate so as to enable your petitioner to determine the amount of his commissions, and the pendency in this court of an action in which said estate is interested * * * entitled *Cyril Pauwelyn Executor, etc., Plaintiff v. Charles A. Elvers, Defendant.*" The nature of this claim does not appear. The value of the property belonging to the estate is estimated to be \$47,350. The court is asked to grant an order authorizing the executor to sell all of the real property belonging to the estate, alleging that the entire amount derived from the sale thereof will be necessary in order to pay the claims approved and allowed, besides expenses, commissions, etc.

It appears that three parcels of the real estate are not mentioned in the will, namely, an undivided one-half interest in the Malone lode claim, and the Belmont and Amy claims. Specific bequests are made of all the rest of it, Daniel Shields being mentioned as devisee of an undivided one-fourth interest in the Tuolumne lode claim, and Thomas McLaughlin as devisee of a lot and house thereon, in the city of Butte.

Appellants Shields and McLaughlin appeared and objected to the granting of the order of sale. Shield's objections are, in substance, first, that for more than ten years prior to the fil-

ing of the petition he had been in open, notorious, adverse, exclusive, uninterrupted and continuous possession of the one-fourth interest in the Tuolumne lode claim belonging to the estate, and that no ancestor, nor predecessor, nor the executor, had in ten years prior to the filing of the petition been seised of it or any part thereof, and that the executor's cause of action is barred by the provisions of sections 29 and 30, First Division, Code of Civil Procedure, of the Compiled Statutes of 1887, and by section 9 of the Political Code, and sections 483, 484 and 3456 of the Code of Civil Procedure of 1895; second, that the interest in this claim was devised to him by deceased for a valuable consideration; that much other property was in the said will devised to charities, without consideration; that such other property is sufficient in value to pay all debts and other claims together with the expenses of administration, and that for this reason the property devised to him should not be sold until after all the property so devised should be exhausted; and, third, that certain property had not been devised at all and that it should first be resorted to to pay claims. McLaughlin objected on the two grounds last mentioned. The executor replied to these objections. Upon the issues thus joined a hearing was had by the court sitting without a jury.

Thereupon the court made its findings of fact and conclusions of law, and entered an order directing a sale. The court found that the debts, costs and expenses of administration already accrued against the estate amount to \$14,417.45, with interest; that there was no money belonging to the estate to pay the same; that the real estate was not yielding any revenue, and that the sale of all of it was necessary to pay the debts. The court further found that there had been no unreasonable delay on the part of the executor in making application for the order of sale; that the property mentioned in the petition belongs to the estate; that none of it has been delivered to the heirs or devisees by the executor, and that the same is in the control of the executor and under the direction of the court.

As conclusions of law the court declares that the objections of Shields and McLaughlin were without merit; that the executor was entitled to have an order of sale as prayed for; that the property be sold by the executor in the manner and order provided for by the statute, and that he exercise his judgment and option as to which portion or interest or parcel of the property specifically devised should be first offered for sale and sold, and that in making said sale he do not offer for sale, or sell, any more of the property than may be necessary to pay said claims, with interest, and the debts, costs and expenses which may hereafter accrue.

Upon these facts and conclusions of law the court entered its order directing the executor to sell so much of the real estate as may be necessary to pay the debts, claims and expenses of the estate, and the costs and expenses of administration accrued or that may hereafter accrue, either in one parcel or in subdivisions, as the executor should judge most beneficial to the estate, and in the order prescribed by the statute and the foregoing findings and conclusions; and that when he shall have sold sufficient for the purposes aforesaid, he shall not sell or offer for sale any more. From this order, so far as it directs the sale of the interests devised to them respectively, Shields and McLaughlin have prosecuted this appeal.

1. Contention is made that the order cannot be sustained because the court denied the appellants a trial by jury upon the issues presented by their objections. Without pausing now to inquire whether any material issues are presented by the objections, but assuming this to be so, and assuming further that upon every like application wherein material issues of fact arise, the right of trial by jury exists, there is no merit in the contention. The Code of Civil Procedure provides: "Sec. 2923. All issues of fact in probate proceedings must be tried in conformity with the requirements of Article II, Chapter II, of this Title, and in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. * * *

Sec. 2924. If no jury is demanded, the court or judge must try the issues joined. If on written demand, a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court or judge, on due notice to the opposite party, must settle and frame the issues to be tried, and submit the same, together with the evidence of each party, to the jury, on which they must render a verdict. * * *

The provisions of Article II, Chapter II, of Title XII, to which section 2923 refers, relate to contests arising over the probate of wills. Section 2340 of Article II, Chapter II, of this Title provides, among other things, that upon the presentation of any one or more of the issues of fact enumerated therein, they must, "on request of either party in writing, filed three days prior to the day set for the hearing, be tried by a jury. If no jury is demanded, the court or judge must try and determine the issues joined. * * *" Under this section it is clearly the duty of the court or judge to try the issues joined, without a jury, unless one is demanded in the manner and within the time prescribed therein. Its requirements presuppose issues joined before the demand for a trial by jury is made. The policy of the law is that proceedings of this nature should progress as speedily as they may, to the end that the affairs of the estate may be closed up and the parties in interest discharged from the supervision of the court. The presiding judge is not supposed to know what issues, if any, are to be made until the pleadings are filed, and not then until attention is called to them. If in any case no issue of fact is presented, the presence of a jury is unnecessary. The section, therefore, not only requires the issues to be made up before the demand is made, but also that the demand be made a sufficient length of time before the hearing to secure the attendance of a jury.

Sections 2923 and 2924, *supra*, are general in their application, while section 2340 refers only to contests over the probate of wills, but the provisions of the latter must be read into the former and be observed whenever the parties desire an issue of fact to be tried by a jury.

In this case the objections of Shields were filed on July 18, 1904, and those of McLaughlin on July 23d. The replies of the executor were filed not later than July 25th. The hearing was begun on September 14, 1904. No written demand for trial by jury was ever filed. It is true that the objections filed by the appellants close with a demand for a trial by jury; but, so far as the record shows, these demands were never called to the attention of the court or judge until the hearing began. Under this condition of affairs, a trial by jury is properly denied, no matter what the issues are.

2. The next contention made is, that the order is erroneous in that it directs a sale of all the real estate, including that devised to appellants, whereas it appears from the objections that these devises were respectively made for a valuable consideration, and therefore that the court could not direct a sale of property so devised until after a disposition of all the other property belonging to the estate. We think this contention is without merit for two reasons: First, the application for the order in this case was made under section 2671 of the Code of Civil Procedure, which lays down the procedure necessary to obtain an order for the sale of real estate. The section provides what the verified petition filed in support of the application shall contain. It must set forth the amount of personal property that has come into the hands of the administrator, and how much, if any, remains undisposed of; the debts outstanding against the decedent, so far as they can be ascertained or estimated; the amount due upon family allowances, or what will be due after the same have been in force for one year; the debts, expenses and charges of administration already accrued, and an estimate of what will or may accrue during the administration; a general description of all the real property of which decedent died seised, or in which he had any interest, or in which the estate had acquired any interest, and the condition and value thereof; and the names of the legatees and devisees, if any, and of the heirs of the deceased, so far as known to the petitioner. Upon these necessary allegations it is not possible for an issue as to

the title of real estate to arise. Nowhere else in this Title do we find any provision upon which the court may enter into an investigation of questions of title. It is well settled by the decisions of this court, that the district court sitting as a court of probate has only such powers as are expressly conferred upon it by statute, and such as are necessarily implied in order to carry out those expressly conferred, and that in the exercise of its jurisdiction it is limited by the provisions of the statute. (*State ex rel. Shields et al. v. District Court et al.*, 24 Mont. 1, 60 Pac. 489.) It cannot be presumed, in the absence of an express declaration to that effect, that the legislature intended that the court, when sitting in probate proceedings, should exercise the extensive powers necessary to such investigations and determine the rights involved. While exercising jurisdiction in these matters, its proceedings are all more or less summary and not suited to the adjustment of equities and the adjudication of rights dependent upon them.

In the second place, section 1822 of the Civil Code provides: "The property of a testator, except as otherwise specially provided for in this Code and the Code of Civil Procedure, must be resorted to for the payment of debts, in the following order: 1. The property which is expressly appropriated by the will for the payment of debts. 2. Property not disposed of by will. 3. Property which is devised or bequeathed to a residuary legatee. 4. Property which is not specifically devised or bequeathed; and 5. All other property ratably. * * *"

It will be seen from an examination of this section that no distinction is made between specific devises for charitable purposes, and those made upon consideration. They are placed upon the same footing. If the property mentioned in the first four classes designated by the statute is not sufficient, specific devises, no matter for what purpose, are to be resorted to ratably; for such devises clearly fall in the fifth class in the enumeration. The appellants have no right to have the property devised to them exempted from sale for the payment of debts, or the sale of it postponed until other property specifically de-

vised has been resorted to for that purpose, for the reason that the devises to them were made for valuable consideration, no matter what that consideration may have been, even though it might be conceded, for sake of argument, that the district court when sitting in probate has jurisdiction under the statute to investigate and determine questions of title upon an application for the sale of real estate.

By the terms of the will, as appears from the record, all the property belonging to the estate, except from the interest in the Malone lode and the Amy and Belmont claims, was disposed of by specific devises to the appellants and others. On the theory assumed by the appellants to be correct (and we think it correct, though the will is not now before us for construction), that by the last clause of the will the executor is made residuary legatee, these interests go to him. They therefore fall in the third class in the enumeration and must be resorted to and exhausted before the property devised to appellants is burdened with any part of the debts. (Code of Civil Proc., sec. 2678.) When, however, the property falling in the first four classes has been exhausted, no distinction may be made among specific devises, but all must bear the burden ratably. In view of these express provisions of the statute, the cases cited by counsel for appellants, in which the courts of other jurisdictions have applied the rule contended for, are not in point. In any event, in this state the court, upon a hearing of the application for the sale of real estate, has no power to proceed except in conformity with the statute. If the devise to either of the appellants was made under such circumstances as would warrant a decree requiring the executor to convey to him, the questions involved and a decree thereon can be had only in a court of equity in an action brought for that purpose. The order made in terms directs the executor to proceed to sell in the order prescribed by the statute, and presumably he will do so and first exhaust the property not specifically devised.

3. Evidence was offered by the appellants tending to show that they had been in the possession of the property devised to

them respectively, holding the same adversely to the executor, for more than ten years prior to the filing of the petition. This was, on objection, excluded by the court as immaterial. The ruling is assigned as error. The contention is made that an application for the sale of real estate is in the nature of an action to enforce a lien upon the lands of the decedent; that title to the estate vests at once in the heirs or devisees, subject only to the payment of debts; and that, such being the case, the right to maintain the application is barred by the provisions of the statute (Comp. Stats. 1887, Div. I, secs. 29, 30; Pol. Code 1895, sec. 9; Code of Civil Proc., secs. 483, 484, 3456), prescribing the time within which actions may be brought to recover real estate or the possession thereof, and actions arising out of the title to real estate, or the rents and profits thereof, unless the application is made before the limitation has run.

While an application to sell real estate does partake somewhat of the nature of an action (*Broadwater et al. v. Richards, Admr.*, 4 Mont. 80, 2 Pac. 544, 546), it is in no sense of the term an action to recover real estate or the possession of it. Nor is it an action arising out of the title thereto, or the rents and profits thereof. Under our system, the whole of the estate, both real and personal, goes into the possession of the executor or administrator, first for the payment of debts, and then for distribution under the will or the laws of succession. (Civil Code, secs. 1821-1823, 1826, 1850 et seq.; Code of Civil Proc., sec. 2559.) Claims of creditors must be presented for allowance within the time prescribed by law, after notice has been published (Code of Civil Proc., sec. 2603), or they are forever barred, whether they are due, not due, or contingent. If a claim is barred by lapse of time at the date of presentation, it may not be allowed. (Sec. 2609.) If rejected, action must be brought against the administrator in the proper court within three months thereafter, or it is barred. (Sec. 2608.) Upon the coming in of the account, the heirs or devisees may contest and have rejected any claim allowed in violation of these provisions. (Secs. 2784, 2791; *In re Mouillerat's Estate*, 14 Mont.

245, 36 Pac. 185.) And since the petition for the sale must set forth the debts of the estate (sec. 2671), it would seem that the appropriate limitation may then be invoked in order to defeat a particular claim, and therefore the sale *pro tanto*. But when claims have been presented and allowed, and are not contestable for the reason that they have not been presented in time under section 2603, *supra*, or that they are barred at the time of the presentation by the particular statute applicable, none of the statutory limitations run as against them. (*In re Arguella*, 85 Cal. 151, 24 Pac. 641; *In re Estate of Schroeder*, 46 Cal. 304.) Furthermore, the question of adverse possession as between the executor and a devisee may not be tried by the court upon an application for the sale of real estate. As has been said already, any question as to the title of property belonging to the estate must be settled in the appropriate action brought in the district court as a court of general jurisdiction. (*In re Estate of Burton*, 63 Cal. 36; *In re Estate of Groome*, 94 Cal. 69, 29 Pac. 487; *Stewart v. Lohr*, 1 Wash. 341, 22 Am. St. Rep. 150, 25 Pac. 457.)

4. Contention is made that the court, in the exercise of its sound discretion, should have denied the application on the ground of the palpably unreasonable delay of the executor in presenting it. Whether or not gross negligence or palpable laches on the part of the executor or administrator is sufficient reason for denying an order of sale in a given case, we do not deem it necessary to discuss or decide. There is abundant authority in support of the affirmative of the proposition. (*Estate of Crosby*, 55 Cal. 574; *Mooers v. White et al.*, 6 Johns Ch. 360; *Wolf et al. v. Ogden*, 66 Ill. 224; *McCrary v. Tasker et al.*, 41 Iowa, 255; *Ricard v. Williams et al.*, 7 Wheat. 59, 5 L. Ed. 398; *Ex parte Allen*, 15 Mass. 58; 2 Woerner on the American Law of Administration, sec. 465.) The policy of the statute requires the administration to be conducted speedily to a close. This fact also lends support to the rule contended for by the appellants. Here, however, the parties—assuming that such a defense could be invoked—tried the question of laches, and the

court decided that under all the circumstances there had been no unreasonable delay. We think the conclusion reached by the court justified upon the facts presented. Soon after letters were issued to the executor, claims were presented to the amount of more than \$30,000. Most of them were rejected. Litigation arose over them. Finally, about one year prior to the making of the application, the principal claims were declared groundless. In the meantime the appellants, desiring that the property belonging to the estate, and particularly that devised to them, should not be sold, encouraged the executor to lease certain of the claims in order to raise money to pay the debts and thus avoid a sale. Indeed, they urged him to make leases and took part in the proceedings instituted to secure orders of court at various times authorizing such leases to be made. The claims which were undisputed were small in amount in comparison with those presented and rejected out of which litigation arose. Under these circumstances, we think it would be unjust to the creditors to permit these appellants to assert that the debts finally found to be due from the estate should not be paid. These remarks dispose of all the questions requiring special notice.

While the findings and conclusions of the court cover matters not properly within scope of the application and the order is somewhat indefinite in its terms, we think the court did not commit any prejudicial error, and that the order should be affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE MILBURN, being disqualified, takes no part in this decision.

ON MOTION FOR REHEARING.

(Submitted November 29, 1905. Decided December 4, 1905.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Appellants have filed a petition for a rehearing of this cause.

alleging two grounds therefor: (1) That the district court found that the property claimed by the appellants belongs to the estate, that this finding is recited in the opinion of this court, and that, though this court held that the district court upon application to sell real estate has no power to determine questions of title, as between the executor representing the estate, and the heir or devisee, yet, this finding having been recited and the order of sale affirmed, it follows that this court has in effect adjudicated the question of title; so that, in a controversy over the title in a court of competent jurisdiction, the order may be pleaded as *res adjudicata* and thus conclude the rights of appellants; (2) that this court, by affirming the order as made, has held that the district court was not in error in directing the sale of the property the title to which is in dispute, whereas that court should have deferred the sale until the question of title might be adjudicated in an action brought, or to be brought, for that purpose.

1. Though the finding referred to is recited in the statement of facts preceding the opinion of this court, it is clear from even a casual reading of the opinion that the judgment can have no such effect as counsel anticipate. If the question of title could not be inquired into and determined by the district court, it must follow that any finding upon that subject by that court was wholly outside of the purview of the application and immaterial. The concluding paragraph of the opinion applies to this finding, though special mention is not made of it. It was error for the court to make a finding upon a matter falling entirely outside of the purview of the application; yet it was error without prejudice and appellants cannot complain.

2. The second ground of the petition proceeds upon the assumption that one purpose of the objections made by appellants in the district court was to secure a delay of the sale, in order to protect the property from sacrifice until the question of title could be determined by a court of competent jurisdiction, whereas they were intended to prevent the sale altogether.

No such theory was entertained by appellants in that court, nor is error assigned in the briefs of counsel in this court upon the refusal of the district court to stay proceedings until the question of title may be determined. The notion that such a stay should have been granted was, so far as the record shows, conceived after the cause was removed to this court. Under the rule, repeatedly declared, this court will not consider errors not assigned in the brief. While we did not, and do not, decide that the district court might not, in its discretion, have postponed the sale of the property in dispute until the question of title could be determined, whether the court did in fact err in failing to do so was not before us on the former hearing, nor is the fact that this court did not consider and decide this question ground for rehearing.

The petition is denied.

Denied.

MR. JUSTICE HOLLOWAY CONCURS.

SCHARRENBROICH, SHERIFF, RESPONDENT, v. LEWIS AND
CLARK COUNTY, APPELLANT.

(No. 2,227.)

(Submitted November 8, 1905. Decided November 24, 1905.)

Constitutional Law—Statutes—Sheriffs—Compensation—Mileage.

1. Appellant was elected sheriff in November, 1904. The law then in force (Pol. Code, sec. 4604) allowed the sheriff ten cents per mile actually and necessarily traveled and ten cents per mile for each person transported to the state prison, reform school and insane asylum. In 1905, after appellant had entered upon the discharge of his duties, the legislature by Act approved March 3, 1905 (Session Laws, 1905, c. 86, p. 180), amended section 4604 so as to allow sheriffs only actual traveling expenses for such transportation. *Held*, that section 31, Article V, of the Constitution prohibiting the increasing or diminishing of a public officer's salary or emolument during his term of office, is not violated by Act of March 3, 1905, when applied to officers elected prior to its passage.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Peter Scharrenbroich, sheriff, against Lewis and Clark county. Plaintiff had judgment, and defendant appeals. Reversed.

Mr. William T. Pigott, and Mr. B. B. Purcell, for Respondent.

Is the excess, over and above expenses, of the amount prescribed and required by sections 4604 and 4606 of the Political Code to be paid to sheriffs as mileage, an emolument? In other words: The compensation, or fee, allowed to plaintiff by sections 4604 and 4606, is \$185.70. His actual expenses were \$90.65. Is the difference of \$95.05 an emolument within the meaning of the Constitution?

At the time of his election plaintiff was entitled to an annual salary, and also to receive for his own use compensation or fees for the services mentioned in sections 4604 and 4605. For the services and outlay of traveling, his compensation was measured by distance and number of persons transported (if any); for the services and outlay of boarding, his compensation was measured by time and the number of persons boarded. In short, he received salary for some services, fees for others. The salary and the fees rest upon the same basis, and the constitutional inhibition applies to the one just exactly in the same degree, and for precisely the same reason, as it does to the other.

What is the allowance for mileage? It is not salary, for salary is a fixed periodical stipend depending upon the time during which the officer serves, and not upon the amount or quality of service performed. He may discharge no duties; he may perform no service; an intruder may occupy the office and do all the work—yet the salary must be paid to the officer. It follows, and is an incident to, the office. It is not merely reimbursement for expenses, for the rate is level and uniform

whether the outlay be greater or less in any case, or in all cases, than the fee fixed.

Furthermore, the statutes—notably original sections 3166, 3142, 3190, 3130, 3131, 3176, and 3179, and present sections 4630, 4604, 4606, 4634, 4591, 4640, and 4643—designate mileage as a fee. Section 4606 calls it compensation.

The mileage prescribed is, therefore, neither salary nor mere reimbursement for the sheriff's pecuniary outlay. These must be eliminated. We have, then, by necessity, but one recourse, and to that we are driven; it is a profit arising from the office—a perquisite, a gain, expressly allowed by law. Hence, it is an emolument, which, as the Constitution ordains, cannot be increased or diminished after the officer's election. Senate Bill No. 87 confessedly attempts to diminish such emoluments as to sheriffs now in office. The bill is, therefore, void as to plaintiff, though valid as to sheriffs hereafter elected. Each word of the Constitution must, if possible, be given meaning, force, and effect. "Salary" is one thing, "emolument" is another. Although emolument is broad enough to include salary within its meaning, salary embraces but one kind of emolument. A salary is an emolument, but an emolument may or may not be a salary. Each word must be given its generally accepted, natural, and appropriate meaning. (*Power v. Commissioners*, 7 Mont. 82, 14 Pac. 658.) We cite this case, for the reason that it defines mileage as "an allowance for traveling, as so much by the mile," and distinguishes mileage and expenses. Mileage is an emolument within the meaning of that word used in the organic law. (*Lloyd v. Silver Bow County*, 11 Mont. 408, 28 Pac. 453.) In *Proctor v. Cascade County*, 20 Mont. 315, 50 Pac. 1017, the court designated mileage as a fee and as compensation. *State ex rel. Donyes v. Board*, 23 Mont. 250, 58 Pac. 439, supports plaintiff's position.

It must be admitted that if the profit or gain accruing to the sheriff from a level and uniform rate of allowance for board of prisoners is an emolument, the profit or gain accruing to him from a level and uniform rate of allowance for traveling is also an emolument. To distinguish between them is impossible.

In *Hoyt v. United States*, 10 How. 109, 135, 13 L. Ed. 348, emoluments are held to embrace "every species of compensation or pecuniary profit derived from a discharge of the duties of the office." *Appel v. Crawford*, 105 Pa. St. 300, 51 Am. Rep. 205, is directly in point, and has been repeatedly approved. (*Vansant v. State*, 96 Md. 110, 53 Atl. 711; *Peeling v. County of York*, 113 Pa. St. 108, 5 Atl. 67; *Thompson v. Phillips*, 12 Ohio St. 617; *Ricketts v. Mayor*, 67 How. Pr. 320; *Commonwealth v. Addams*, 95 Ky. 588, 26 S. W. 581; *Commonwealth v. Carter*, 21 Ky. Law Rep. 1509, 55 S. W. 701; *Twombly v. Pinkham*, 3 N. H. 370; *Puelston v. United States*, 88 Fed. 970 (mileage fees); *Jacobus v. United States*, 87 Fed. 99 (mileage fees); *Hightower v. Bamberg County*, 54 S. C. 536, 32 S. E. 576 (mileage called fee); *Williams v. Kershaw County*, 56 S. C. 400, 34 S. E. 694 (allowance for board as compensation for services); *Weeks v. Texarkana*, 50 Ark. 81, 6 S. W. 504; 3 Words and Phrases, 2367, 2712.) Bouvier's Law Dictionary defines mileage as an allowance for trouble and expenses in traveling on public business. This is the correct definition, and has been adopted in *Howes v. Abbott*, 78 Cal. 272, 20 Pac. 572, and 20 Am. & Eng. Ency. of Law, 613. (See, also, *Mudgett v. Liebes*, 14 Wash. 594, 45 Pac. 20.)

Mr. Albert J. Galen, Attorney General, and Mr. E. M. Hall, Assistant Attorney General, for Appellant.

The term "mileage" has a settled and well-defined meaning. "What is usually signified by the term 'mileage' is an allowance for traveling, as so much by the mile." (*Powers v. County Commrs. of Choteau Co.*, 7 Mont. 82, 14 Pac. 658; 20 Am. & Eng. Ency. of Law, p. 613; *Richardson v. State*, 66 Ohio St. 108, 63 N. E. 594.)

The word "compensation," as used in section 4604, does not mean salary or emolument. Webster's Dictionary defines "compensation" as follows: "2. To be equivalent in value or effect to; to counterbalance; to make amends for." Salary is a certain sum paid at fixed periods for services performed.

Emoluments are fees paid an officer for services performed, as provided in section 4592. Compensation, as the word is used in section 4606, means the sums allowed an officer who receives either salary or emoluments to reimburse him for necessary expenses incurred in performing such services. Therefore, the proviso in section 4606 means "that nothing in this section shall be held to apply to the [reimbursement] received by the sheriffs [for traveling expenses] while in the performance of official duties." If the legislature, when amending said sections 3140, 3141 and 3142 of the original Code, intended that the "mileage" in sections 4604 and 4606 was not only to pay actual traveling expenses, but the excess, if any, after paying such expenses, was to be an increase of the sheriff's pay by way of emoluments as distinguished from his fixed salary, then it would have also amended section 3130, now numbered 4591, which provides that "All fees, penalties, and emoluments of every kind must be collected by him for the sole use of the county." It is clear that the legislature did not consider said mileage, or any part thereof, an emolument, for if so it would certainly have also amended said section 4591.

It is the well-established principle of law that under constitutional provisions similar to ours, the salary, compensation, fees or emoluments of a constitutional officer cannot be increased or diminished after his election or appointment. Such provisions apply, however, to the salary *or* emoluments received by the officer as full compensation for the personal discharge of official duty by him, as distinguished from money allowed to compensate or reimburse him for actual and necessary traveling expenses incurred in performing such official duties.

It should be noticed that in said section 31 of the Constitution the language is "salary *or* emoluments" instead of "salary *and* emoluments." It is evident that the framers of the Constitution used the word "emolument" in the same sense as the word "salary." While the amount of such salary cannot be increased or diminished after his election or appointment, it is well established by numerous authorities that the method or

manner of allowing and paying the actual and necessary expenses of his office can be changed by the legislature at any time, and such allowance may be changed during his term of office from mileage to actual expenses. So long as he is allowed his actual and necessary expenses in performing official duties, whereby he gets his salary net, such legislation is not in conflict with the constitutional prohibition against increasing or diminishing salaries or emoluments. (*Kirkwood v. Soto*, 87 Cal. 394, 25 Pac. 488. See, also, *Commonwealth v. Carter*, 21 Ky. Law Rep. 1509, 55 S. W. 702; *Gobrecht v. Cincinnati*, 51 Ohio St. 68, 36 N. E. 732, 23 L. R. A. 609; *State v. Grimes*, 7 Wash. 445, 35 Pac. 361; *Thompson v. Phillips*, 12 Ohio St. 617; *Briscoe v. Clark Co.*, 95 Ill. 309; *Milwaukee County Supervisors v. Hockett*, 21 Wis. 620, and particularly see *Dane v. Smith*, 54 Ala. 47.)

To the contrary, however, see the case of *Apple v. Crawford County*, 105 Pa. St. 302, 51 Am. Rep. 205, construing a constitutional provision the same as ours. This case cites no authorities, and seems to have been decided upon the definition of emolument given in Webster's Dictionary. That case practically holds that inasmuch as "emolument" is defined to be a "profit" or "gain," and inasmuch as the sheriff succeeded in making "profit" or "gain" out of the amount allowed him for the purpose of paying the expenses of boarding prisoners, therefore such allowance was an emolument, as the term is used in the Constitution. It is the same method of reasoning around a circle that the respondents in the case at bar have resorted to in order to maintain their contention that "mileage" is an emolument. Furthermore, we have not been able to find any section of the Pennsylvania statutes, in force at the time the case of *Apple v. Crawford County*, *supra*, was decided, which is similar to said section 4594 of our statutes.

MR. JUSTICE MILBURN delivered the opinion of the court.

This case is on appeal from a judgment in favor of the plaintiff and respondent. The plaintiff was elected sheriff for the

county of Lewis and Clark in 1904 and is still the incumbent of that office. In the months of March, April and May he, in obedience to lawful orders, transported three persons to the insane asylum and one to the reform school, necessarily traveling twelve hundred and thirty-eight miles, for which distance the statute, in force at the time of his election, allowed him \$185.70 for mileage of himself and the persons in his charge. His actual expenses were \$90.65, leaving, as respondent claims, "\$95.05 as clear gain or profit to him for the services performed in traveling and dieting and conveying the persons to the asylum and school." His claims were disallowed in part, he being allowed the sum of \$90.65, the actual amount of his expenses. The court below upon an agreed statement found the amount claimed by the sheriff and rendered judgment against the appellant Lewis and Clark county for \$185.70. Hence this appeal.

The question to be settled is: Which law applies—the law in force at the time of the sheriff's election, which allowed him ten cents per mile mileage, or Senate Bill No. 87 (Chapter 86, page 180, Act of March 3, 1905), passed after his taking office and allowing actual expenses only? The discussion has gone over a wide field, taking into consideration numerous sections of the original Codes, which were passed as a whole in 1895 and amended at the same session in many particulars. There has been a wide range in the discussion as to what laws have been repealed by implication, expressly and by substitution. It is interesting, but not important in this case, to trace the legislation affecting and relating to the income and expense account of the sheriff.

It is conceded that the present statute, which allows only actual expenses to the sheriff, is valid and binding upon all officers elected after the date of its passage. It is also understood that the Act in force at the time of the election of the sheriff was valid.

The point made by respondent is, that the Constitution (section 31, Article V) prohibits the increasing or diminishing of

the amount the sheriff shall receive for expenses during the term of office to which he is elected. The section is as follows: "Sec. 31. Except as otherwise provided in this Constitution, no law shall extend the term of any public officer, or increase or diminish his salary or emolument after his election or appointment; *Provided*, that this shall not be construed to forbid the legislative assembly from fixing the salaries or emoluments of those officers first elected or appointed under this Constitution, where such salaries or emoluments are not fixed by this Constitution."

We think it impossible to reconcile all the different definitions and attempted definitions of the words "compensation" and "emolument," as used in the several sections of the statute and in the opinions of this court, unless we adopt what we believe has always been the intention of the legislature and the view of this court, that in respect of sheriffs the word "salary" means what it ordinarily means: a fixed compensation, made by law to be paid periodically for services, whether there be any services actually rendered or not. The word "emolument" is more comprehensive than "salary." But the Constitution says "salary or emolument." There are those who receive salaries, and there are other officers who receive certain emoluments which are not salaries. For instance, section 4592 of the Political Code says: "The county surveyor, coroner, public administrator, justice of the peace, and constables may collect and receive for their own use, respectively, for official services, the fees and emoluments prescribed in this chapter. All other county officers receive salaries." This last sentence, saying that "all other county officers receive salaries," is pregnant with meaning, being unnecessarily put into that section, unless it is there placed from an abundance of caution, to let the people know that certain county officers receive salaries, and that the words "fees and emoluments" are not to include in their scope and meaning the word "salary," and that salaried officers are not to have "fees and emoluments" other than salaries from the state or county. In other words, that section might

be well read thus: Whereas all other county officers receive salaries, therefore, the county surveyor et al., who do not receive salaries, may receive and collect fees, etc., for their own use.

The object of the legislature was to have certain services performed for the people, and not to make money for a sheriff or to set him up in business. The old idea of paying an officer was to feed him and clothe him and take care of his family, while he was giving his services to the people. There never was any idea that holding public office was a private business. The purpose of the people is to make its officers whole, not to enrich them. The salary is to pay the officer for his time and services. The mileage as originally fixed was a uniform rate fixed by the legislature, with a view to make the sheriff whole for what he might lay out on account of the people. It was not the intention of the legislature to give the sheriff ten cents a mile to take a prisoner from Miles City to the penitentiary, in order that he might be privileged to figure out how cheaply he could carry him—perhaps to the great discomfort of the unfortunate convict—and how big a margin of profit or gain he could make out of the performance of his own duty to take the prisoner to the penitentiary in comfort and safety. It never was intended that the ten cents per mile should be an inducement to the sheriff to take five persons separately, and thereby get much more for himself than he would get if he should take them at one and the same time with one deputy to assist him.

The same reasoning would apply to the feeding of prisoners in the county jail. If the statute allows fifty cents per day for feeding a prisoner, there is no understanding that the sheriff may make any gain or profit for his private use out of this stipend. The direction of the legislature is to give that prisoner fifty cents' worth of food every day, and not to feed him perhaps on bread and water at an expense of five cents, thus making forty-five cents for the sheriff. The object of the law is to put food into the stomach of the prisoner, and not money into the pocket of the sheriff.

If John Doe should be lawfully elected to the office of sheriff of a certain county, but should be counted out and his opponent installed, and, upon a contest, at the end of a year he should gain the office and the other man be ousted, how about the salary and the mileage account? Certainly, the *de facto* sheriff would not get the salary, but the lawfully elected man would; but would the latter, who had not served during the first year, be entitled to ten cents a mile for every prisoner transported to the penitentiary meantime and fifty cents a day for every prisoner fed in the jail, or to the difference between what it actually cost and what was paid therefor by the county? We think not. If it were a part of the compensation fixed by law for the performance of certain services by the sheriff in the same way and manner as the salary is, then the sheriff who had been kept out of office for the year unlawfully would be entitled to the mileage as well as the salary. But is there anyone who would venture to say that he could successfully sue in any court of justice to collect the mileage, or the difference between the actual cost of transportation of persons and the mileage, or the difference between the actual cost of feeding prisoners and the allowance of fifty cents per day?

We have not had any authority, except one, called to our attention supporting any other views than those we have advanced above, and that case is *Apple v. County of Crawford*, 105 Pa. St. 300, 51 Am. Rep. 205. This case seems to depend largely upon the definition of the word "emolument," as found in the dictionaries. We cannot see wherein the dictionaries are opposed to the views hereinbefore set forth. We acknowledge that the word "emolument" includes the meaning of "gain," "profit," "compensation," etc. But the intention of the legislature must be considered in determining what is meant, not only by "emoluments," but who shall receive them. In this case we do not consider that the legislature ever intended that the sheriff should make a cent either in traveling on business or feeding prisoners, whether the law allows ten cents a mile or "actual expenses." We think that the legislature probably un-

derstood that the expenses averaged about ten cents a mile, including guards, dieting, transportation, etc., and that in some cases sheriffs saved something honestly, and in other cases they lost. But whether loss or gain, it was for the legislature to say how much they should have to meet expenses. Now all sheriffs are treated alike, and there is not any opportunity for one to gain unjustly and another to lose unjustly in the performance of his duty.

The salary pays the sheriff for taking the person to prison. The "mileage" paid the expense incurred. The *actual expense* was paid by the "mileage," were it more or less. Now the actual expense, and not any more or less, is paid by the people.

For the reasons above stated we do not believe that the Constitution of the state is violated by the legislation complained of, when applied to officers elected prior to its passage, and believing that the court below erred, the judgment is reversed and the court is directed to enter judgment for the defendant upon the statement of facts submitted.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

Rehearing denied January 29, 1906.

SHORT, APPELLANT, v. ESTEY ET AL., RESPONDENTS.

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(No. 2,169.)

(Submitted November 9, 1905. Decided November 24, 1905.)

*Equity—Jury Trial—Directing Verdict—Findings—Trustees—Deed Absolute.**Equity—Jury Trial—District Courts—Directing Verdict.*

1. Where the cause of action stated in the complaint is one of purely equitable cognizance, and no issue is presented which would entitle either of the parties to a jury trial, the court may direct the jury in attendance to return a verdict, even though the evidence be conflicting.

District Courts—Equity—Directing Verdict—Findings.

2. The rendition of a verdict by direction of the court, in an action involving questions of equitable cognizance, is equivalent to a finding of the court for the party in whose favor it was rendered.

Trustees—Deed Absolute—Evidence—Directing Verdict.

3. Plaintiff, in an action to obtain a decree declaring defendants trustees for him of the legal title to an undivided interest in a mining claim, and for an accounting, testified that he had conveyed his interest to defendants under a written agreement signed by one of the defendants to the effect that upon removal of his incapacity occasioned by over-indulgence in drink, the same be returned to him; and that defendants had accounted to him for the rents for a period of two years. The deed from plaintiff to defendants was duly acknowledged and recorded. The alleged agreement was in the handwriting of plaintiff, and neither acknowledged nor recorded. The defendants' evidence tended to show that they had bought the interest, giving in consideration \$1,000 and a one-half interest in another mining claim; that plaintiff never demanded a reconveyance, or an accounting until shortly before the action was brought—a period of ten years, and that they had never accounted to plaintiff. *Held*, that the court was justified by the evidence in directing the jury to find for the defendants to the effect that the conveyance had been made in pursuance of an absolute sale for value.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by Z. A. Short against John F. Estey et al. From a judgment in favor of defendants and an order denying him a new trial, plaintiff appeals. Affirmed.

Messrs. Kirk & Clinton, for Appellant.

The court erred in withdrawing the case from the jury. The evidence offered on behalf of plaintiff clearly showed a right in

him to recover, in the absence of anything to the contrary. It has been held time and again by the courts of this state and is no longer an open question that upon motion for a nonsuit or to direct a verdict, the testimony on behalf of the plaintiff shall be taken as true. (*Cain v. Gold Mt. M. Co.*, 27 Mont. 535, 71 Pac. 1004; *McKay v. Montana Union Ry. Co.*, 13 Mont. 17, 13 Pac. 999; *Creek v. McManus*, 13 Mont. 157, 32 Pac. 675; *Herbert v. King*, 1 Mont. 475; *Gans v. Woolfolk*, 2 Mont. 463; *Sayer v. Water Co.*, 15 Mont. 1, 37 Pac. 838; *Jensen v. Barbour*, 15 Mont. 582, 39 Pac. 906; *Mayer v. Carothers*, 14 Mont. 274, 36 Pac. 182.) In *Mayer v. Carothers*, last above cited, this court held that where an equitable defense is pleaded to an action of ejectment, and the court peremptorily directs the jury to find for the plaintiff, such direction is in effect a nonsuit of defendant's defense, and, therefore, whatever defendant's testimony tends to prove as to such defense must be taken as proved. If the testimony of the plaintiff Short be taken as true for the purposes of these motions, and it must be so taken under the decisions of this court, his right to recover is clearly shown, and the motion for directed verdicts should have been denied.

Mr. W. F. Davis, for Respondents Estey.

There is certainly a vast difference between the question of nonsuit or directed verdict in actions at law and the question of directed verdict in suits in equity. Bearing in mind that this is an equity case, it was in reality tried by the court as chancellor, the jury being merely advisory. As said by Mr. Spelling in his recent work on New Trial and Appellate Practice, "All trials in equity cases are by the court, whether a jury is interposed or not; and the verdict of the jury in an equity case, being advisory merely, does not constitute a decision until the same is adopted by the court." (1 Spelling on New Trial and Appellate Practice, p. 644, sec. 361.) The cases cited by appellant are inapplicable for the reason that they were actions at law to recover damages for personal injuries

and the like. (*Leggat v. Leggat*, 13 Mont. 190, 33 Pac. 5; *Kleinschmidt v. Greiser*, 14 Mont. 494, 43 Am. St. Rep. 652, 37 Pac. 5; *Sanford v. Gates, Townsend & Co.*, 21 Mont. 277, 53 Pac. 749.) Under the foregoing authorities, we submit that this court, in order to reverse the judgment and order appealed from, must find that "as a matter of law" the evidence in its entirety was such as to sustain a verdict for the plaintiff only, and that there was no evidence to sustain any other verdict. The record shows that there was not only a conflict in the evidence, but that it actually preponderated in favor of the defendants. Even in cases where the amount of evidence and the number of witnesses largely preponderate in favor of the party against whom findings or verdicts are returned in the trial court, reviewing courts do not for that reason alone reverse in such cases because of the presumption in favor of the findings or verdict, due to the presence of the witnesses in the trial court and the opportunity afforded for observing their character and demeanor. (*Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6, and cases therein cited.)

Mr. J. L. Wines, for Respondents Umhang, Smith and Capell.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to obtain a decree declaring the defendants trustees for the plaintiff of the legal title of an undivided one-sixth interest in the Ramsdell quartz lode claim, situate in Butte, Silver Bow county, and directing a conveyance by them to him. An accounting is also demanded for the rent of the property during the time it has been occupied by the defendants.

The complaint alleges, in substance, that on January 1, 1893, the plaintiff was the owner of said interest and certain buildings upon the claim, and was in possession of the claim under an arrangement with his co-owners; that on that date he executed a deed to the defendant, John F. Estey, and delivered the possession to him, with the exception of one small cabin, which plain-

tiff retained; that though the deed was absolute in form and for a consideration stated therein, its purpose was to convey the title in trust for plaintiff, and was so accepted by Estey, as is witnessed by the following writing, executed by him at the same time and delivered to plaintiff: "This is to certify that for the sum of Five Thousand Dollars (\$5,000.00), for which I have given my note, I have bought all of Z. A. Short's interests in the Ramsdell mining claim, formerly known as the Maude S., together with three houses. I agree not to dispose of any of the property in any manner but to take good care of it all. I will deed him back all of the said property at any time that he wants it, if he pays me for the brick house that I build on the ground or what it is worth at the time he buys it. I will also promptly refund to Z. A. Short all rents that I am allowed to collect, the use of ground to be compensation for services.

(Signed) "JOHN F. ESTEY."

That thereafter said Estey entered into the possession of the premises and collected all rents for the same, fully accounting to plaintiff therefor until February 1, 1895; that he thereafter failed to account further, but converted the rents to his own use; that plaintiff prior to the bringing of this action demanded a reconveyance of the property and an accounting, offering at the same time to pay to plaintiff the price of the brick building referred to in the foregoing writing; that the other defendants claim some sort of separate interests in the premises, but that such interests, whatever they are, were obtained by them from Estey with full knowledge of plaintiff's rights and are therefore subject and subordinate to them.

The defendants Estey and wife admit that the property was conveyed to John F. Estey by the plaintiff, but allege that such conveyance was made to him in pursuance of an absolute sale to him by plaintiff for a valuable consideration, without condition or reservation, or any understanding or agreement on his part, that he was to reconvey at any time or account for the rents. They specifically deny the execution and delivery of the agreement set forth in the complaint, or any other agree-

ment at any time of like import. Each of the other defendants filed a separate answer, in which he claims as a purchaser of an interest either directly or by mesne conveyances, from Estey, and alleges that he purchased in good faith for value, without notice of plaintiff's equities, if any such there are. The plaintiff by replication denies all the affirmative allegations of the defendants.

The cause was tried by the court sitting with a jury. When the evidence had all been submitted, the defendants requested the court to direct the jury to render a verdict in their favor. This motion was sustained and the jury directed accordingly. Upon the verdict so rendered, judgment was rendered and entered for the defendants for their costs. Plaintiff has appealed from the judgment and an order denying him a new trial.

The first assignment is that the court erred in directing a verdict. Counsel for appellant invokes the rule that no case should ever be withdrawn from the jury, unless the conclusion necessarily follows, as a matter of law, that no recovery could be had upon any inference which could reasonably be drawn from the evidence submitted. He points out that upon the issues presented by the pleadings, there was a substantial conflict in the evidence, and insists that, such being the case, he was entitled as a matter of right to a finding thereon by the jury. This rule is applicable in all cases at law; for in such cases the weight of the evidence and the credibility of the witnesses are matters falling exclusively within the province of the jury. But this is not such a case. The cause of action stated in the complaint is one of purely equitable cognizance. There is no issue presented of such a character as would entitle any of the parties to a trial by jury, according to the usual course of law. The court, then, was not bound to call a jury; and, if it had submitted the case for findings, it would not have been bound by them. In such cases the findings may aid the conscience of the judge, but may not control his judgment. The findings, and judgment are his. If, when the jury has made findings, the judge is not satisfied with them, he may disregard them and

so find as to satisfy his own conscience. Such being the case, the court may direct a verdict, even though the evidence be conflicting, as was done in *Sanford v. Gates, Townsend & Co.*, 21 Mont. 277, 53 Pac. 749, where the questions involved were of equitable cognizance; for this direction to the jury is equivalent to a finding by the court in favor of the defendant. Whether the finding of the court in this case was erroneous depends, therefore, upon the evidence submitted, and whether it preponderates against the conclusion reached. (*Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Finlen v. Heinze et al.*, 32 Mont. 354, 80 Pac. 918.)

The court, in effect, found that the conveyance made to Estey was in pursuance of an absolute sale for value, without condition or reservation, and that the contract set out in the complaint was never executed and delivered as alleged by plaintiff. Not only does the evidence not preponderate against this finding, but it amply justifies it. The plaintiff himself was the only witness who testified on his behalf as to the facts surrounding the execution of the deed. He stated that he had become incapacitated by over-indulgence in drink, and, having confidence in the defendant, John F. Estey, desired him to take a conveyance of his interest in the claim until such time as he could resume control of it himself; that this defendant agreed to do so, and thereupon the deed and the agreement were executed. He further testified that the defendant assumed control of the property and collected the rents and accounted for them for about two years, but that he then refused to account further. The evidence on the part of the defendants tends strongly to show that Estey bought the interest, giving as a consideration for it \$1,000 in money, part in cash and part on time, but afterward paid, and also a deed to an undivided one-half interest in another claim situate in the same vicinity which the defendant Estey then owned; that no other agreement was then or thereafter executed with reference to the matter; and that the plaintiff never, after the conveyance was executed and delivered, made any demand upon this defendant for a reconveyance or

for any accounting, until about the time the action was brought,—a period of about ten years. It further tends to show that the defendant Estey and his wife collected the rents for the property, but never made any accounting at any time to plaintiff for any part thereof or recognized that he had any interest in the property. The deed from the plaintiff to Estey was duly acknowledged and recorded. The agreement was neither acknowledged nor recorded. The only evidence introduced tending to show that it was ever made was the testimony of plaintiff supported by an alleged copy made in the handwriting of plaintiff, he claiming that the original had been lost. Under these circumstances, the finding of the court may not be disturbed.

Our conclusion upon this branch of the case renders it unnecessary to construe the writing and determine whether in fact it amounts to a declaration of trust; for it is wholly immaterial what the character of the writing is, if, as the court found, defendant Estey never executed it. The same may be said of the question whether the plaintiff's cause of action is barred by the statute of limitations or laches.

The judgment and the order denying a new trial are affirmed.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

**BOURKE, RESPONDENT, v. BUTTE ELECTRIC AND
POWER CO. ET AL., APPELLANTS.**

(No. 2,180.)

(Submitted November 9, 1905. Decided November 27, 1905.)

Electricity—Personal Injuries—Inspection of Plant—Instructions—Evidence—Earning Capacity of Plaintiff—Damages—Excessive Verdict—Appeal.

Electricity—Personal Injuries—Pleadings—Answer—Negative Pregnant.

1. The answer to a complaint, in an action for personal injuries against an electric light and power company, charging that de-

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defendants on a certain day hung the wire with which plaintiff came in contact over and across a trestle, which denied that any of the defendants, except one, so hung the wire, and that any of the defendants hung such wire only three feet or about three feet above the trestle, but alleged that a certain wire had been strung across it by one of the defendants a distance of about four and a half feet from said trestle, contained a negative pregnant and did not raise any issue as to whether the wire was placed in position before or after the erection of the trestle.

Electricity—Personal Injuries—Trespassers—Instructions.

2. *Held*, in an action for personal injuries alleged to have been received by plaintiff on coming in contact with one of defendant electric light company's wires strung over a trestle upon which plaintiff was working as an employee of a mining company, that in the absence of anything to justify the conclusion that either the owner of the wire or the owner of the trestle was a trespasser as to the other, an instruction imposing on defendants the duty of inspecting their lines of wire was not objectionable on the ground that plaintiff was a trespasser to whom defendants owed no duty of inspection.

Electricity—Duty of Defendant to Inspect Plant—Instructions.

3. An instruction given in an action for personal injuries, received by plaintiff through coming in contact with a wire charged with electricity, strung by an electric light and power company over a trestle upon which plaintiff was at work, to the effect that defendant was bound to maintain a system of inspection by which any change in the physical condition of the plant, poles or lines of wire, which might create or increase danger to human life, could be detected, correctly stated the law.

Electricity—Duty of Defendant in Handling—Instructions.

4. The district court properly charged the jury in an action for personal injuries sustained by plaintiff while rightfully in pursuit of his occupation, by coming in contact with a wire charged with electricity, which wire had been strung by an electric light company over a trestle used by plaintiff in his work—that persons or corporations who handle a force of great inherent danger to the lives and safety of others are held by law to a high degree of care in handling it, and that the care required is measured by and equal to the danger.

Electricity—Personal Injuries—Instructions—Prejudice.

5. In an action for injuries to plaintiff by coming in contact with defendant's live electric wire, overhanging a trestle on which plaintiff was working, an instruction that there was no evidence that defendants had actual notice of the erection of the trestle, and that their wires were in close proximity thereto, and that the jury should only consider this in the event they believed that the wire was hung before the trestle was erected, otherwise defendants were chargeable with knowledge of the existence of the trestle and the physical conditions surrounding it—was not prejudicial to defendant.

Appeal—Instructions Favorable to Appellant—Effect.

6. A judgment will not be reversed for errors in instructions which are in favor of appellant.

Personal Injuries—Damages—Earning Capacity—Evidence.

7. Evidence as to the wages received by plaintiff, in an action for personal injuries, a year prior to the date of the accident was admissible as bearing on his earning capacity.

Personal Injuries—Damages—Earning Capacity—Evidence.

8. While an instruction should be given in an action for personal injuries in determining the amount of damages to be awarded for impairment of earning capacity in the future, to the effect that the compensation to be allowed should be such as will purchase an annuity equal to the difference between the annual earnings of plaintiff before the injury and the amount he might earn thereafter, if any, yet where such a charge was not given and the one submitted on this question was not complained of or a more specific one asked, defendants may not be heard to contend that the jury was improperly instructed in this regard.

Personal Injuries—Damages—Instructions.

9. In an action for personal injuries, an instruction that, if the jury found for plaintiff, in fixing his damages, they might consider mental and physical suffering caused by the injury, wages which plaintiff might have earned from the date of the injury to the date of the trial, and, if the injuries were permanent, any loss to him by reason of the impairment of his capacity to earn money in the future, was proper.

Personal Injuries—Excessive Damages—Appeal—Burden of Showing Error.

10. The burden of showing error on the ground of excessive damages awarded in a personal injury case rests upon appellant, and in the absence of a clear showing the supreme court will not interfere.

Personal Injuries—Excessive Damages—Appeal.

11. Where, in an action for personal injuries, the evidence was such that the jury might have found that the injuries sustained were permanent, and that plaintiff, who was forty-five years of age and had previous to the accident earned \$3.50 per day, would not thereafter be able to earn money, a verdict of \$20,000 in his favor will not be set aside on appeal as excessive.

Appeal from District Court, Lewis and Clark County; Henry C. Smith, Judge.

ACTION by Martin Bourke against the Butte Electric and Power Co. and George T. Aiken. Judgment was entered in favor of plaintiff. From the judgment and from an order denying them a new trial, defendants appeal. Affirmed.

Mr. J. L. Wines, Mr. M. J. Cavanaugh, and Messrs. Forbis & Mattison, for Appellants.

In order to maintain an action for negligent injury, it must appear that there was a legal duty due from the person inflicting the injury to the person on whom it was inflicted, and that such duty was violated by a want of ordinary care on the part

of defendant. (*Kahl v. Love*, 37 N. J. L. 5; *Lawson on Rights, Remedies and Practice*, 1149 et seq.; *Evansville etc. Ry. Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783; *Bishop on Non-Contract Law*, sec. 446 et seq.) It is not sufficient that there be a general duty to the public which is violated, but in all civil cases the right to enforce such duty must reside in the individual injured, because of a duty due him from the person injuring him, or he cannot recover. (*Cooley on Torts*, 660; *Bishop on Non-Contract Law*, sec. 446; *Kessel v. Butler*, 53 N. Y. 612. See, particularly, *Peck v. Batavia*, 32 Barb. (N. Y.) 634.)

Defendants' liability in this case depends upon the question of contemplation of damages. The rule on this subject is: That the defendant is not liable in negligence where no injurious consequences could reasonably have been contemplated as a result of the act or omission complained of. (*Blythe v. Birmingham Water Works Co.*, 11 Ex. 781; *Benson v. Central Pac. Ry. Co.*, 98 Cal. 45, 32 Pac. 809; 21 Am. & Eng. Ency. of Law, 2d ed., p. 486; *Fulton v. Grieb Rubber Co.*, 69 N. J. L. 221, 54 Atl. 561; *McCaughna v. Owassa & Corruna Elec. Co.*, 129 Mich. 407, 89 N. W. 73; *Snyder v. Wheeling Elec. Co.*, 43 W. Va. 661, 64 Am. St. Rep. 922, 28 S. E. 733, 39 L. R. A. 499.)

The court erred in charging the jury to the effect that a legal duty was imposed upon the appellants to inspect their electric wires at such reasonable times, or often enough to enable them to know and ascertain that there had been erected a trestle in such proximity to their electric wires, that one using such trestle was in danger of coming in contact with said wires. Such is not the law when an attempt is made to apply it to the facts of this case. (*Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 54 Am. Rep. 718, 4 N. E. 752.) The rule of law is the same in this as in other negligence cases. "The negligence is not the proximate cause of the injury unless, under all of the circumstances, the accident might have been reason-

ably foreseen by a man of ordinary intelligence and prudence. It is not enough to prove that the accident is the natural consequence of the negligence. It must also have been the probable consequence. (*Block v. Milwaukee St. Ry. Co.*, 39 Wis. 378, 46 Am. St. Rep. 849, 61 N. W. 1101, 27 L. R. A. 365.) "Where reasonable care is employed in doing an act not in itself illegal or inherently likely to produce damage to others, there will be no liability, although damage in fact ensues." (21 Am. & Eng. Ency. of Law, 2d ed., pp. 463, 465; *Hall v. Murdock*, 119 Mich. 389, 78 N. W. 329; *Fogarty v. Finlay*, 10 Cal. 239, 70 Am. Dec. 714; *Bishop v. Webber*, 139 Mass. 411, 52 Am. Rep. 715.)

Where a third person has created a dangerous condition on the premises of the defendant, which the defendant neither knew of nor could have known of by the exercise of reasonable care and vigilance, he will not in general be liable to the person injured thereby, though the latter was rightfully on the premises. (*Clap v. LaGrill*, 103 Tenn. 164, 52 S. W. 134; 21 Am. & Eng. Ency. of Law, 2d ed., p. 467.) An act or omission from which injurious consequences could not in a sense have been foreseen is not negligence. (21 Am. & Eng. Ency. of Law, 2d ed., p. 471.) This was just the case at bar. The defendant put up poles and strung his wires so high and in such an unfrequented place, that he had no right to expect that they could ever injure any person, except such person either climbed a ladder or a pole up to within reaching distance of the wires. Where the trespass may reasonably be anticipated, it may become a duty to keep the premises in a safe condition (21 Am. & Eng. Ency. of Law, 2d ed., p. 473); or where one is actually aware of the presence of the trespasser. (*Herrick v. Wixom*, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333.) And where, under the circumstances, such as existed in the present case, the presence of the trespasser on the premises was not reasonably to have been anticipated, there is, of course, no duty as to such person to have the premises kept in safe condition. (*East St. Louis Con. Works v. Jenks*, 54 Ill.

App. 91; *Atchison R. R. Co. v. Todd*, 54 Kan. 551, 38 Pac. 804; *Winters v. Kansas City Cable Co.*, 99 Mo. 509, 17 Am. St. Rep. 591, 12 N. W. 652, 6 L. R. A. 536; *Witte v. Stifel*, 126 Mo. 295, 47 Am. St. Rep. 668, 28 S. W. 891; *Schmidt v. Bauer*, 80 Cal. 569, 22 Pac. 256, 5 L. R. A. 580.) The mere failure to ward against a result which could not have been reasonably anticipated is not actionable negligence. (*Atkinson v. Goodrich Transfer Co.*, 60 Wis. 141, 50 Am. Rep. 352, 18 N. W. 764; *Barton v. Pepin County Agr. Soc.*, 83 Wis. 19, 52 N. W. 1129; *Huber v. LaCrosse City Ry.*, 92 Wis. 636, 53 Am. Rep. 940, 66 N. W. 708, 31 L. R. A. 583.)

The instruction of the court in this case implies that the defendants must have anticipated accident under the circumstances of this case. This was error. (56 Cent. L. J. 490.) But it is the fact that persons may come in contact that imposes the duty of insulation, and hence the duty of inspection. This duty may or may not exist, according to the circumstances, considering such facts as place, location, frequency of visitors, travelers, etc. A person may be guilty of contributory negligence where he takes hold of a wire where there is no reason to believe it should be insulated. (*Hector v. Boston Elec. Light Co.*, 161 Mass. 558, 37 N. E. 773, 25 L. R. A. 559.) This case holds that an electric light company owes no duty to a trespasser or licensee, nor any duty to insulate where there is no probability of contact.

Where wires are charged with a high tension current the legal duty would require it (defendant) to see that its wires, when strung where persons are liable to come in contact with them were properly insulated. (*Brown v. Edison Elec. Ill. Co.*, 90 Md. 400, 78 Am. St. Rep. 442, 45 Atl. 182, 46 L. R. A. 745.) But against a trespasser the company owes no duty to insulate or inspect. (*Newark Elec. & Power Co. v. Garden*, 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 725.) There must have been a reasonable expectation that a contact with electric wires would happen to impose the duty of taking precautions against it. (See *Sullivan v. Boston etc. R. R. Co.*, 156 Mass. 378, 31 N.

E. 128; *Hector v. Electric Light Co.*, 161 Mass. 558, 37 N. E. 773, 25 L. R. A. 559, 174 Mass. 212, 75 Am. St. Rep. 300, 54 N. E. 539; *Spiecher v. New York etc. Tel. Co.* (N. J.), 39 Atl. 361. See *Martinek v. Swift & Co.*, 122 Iowa, 611, 98 N. W. 477; *Wolpers v. New York etc. Co.*, 86 N. Y. Supp. 845, 91 App. Div. 424.) Unless the alleged negligence of the defendant was the proximate cause of the injury of which the plaintiff complains, there can be no recovery. (*Clifford v. Denver & R. Co.*, 9 Colo. 333, 12 Pac. 219; Wharton on Negligence, sec. 3; Shearman and Redfield on Negligence, sec. 25; Deering on Negligence, sec. 8.)

Mr. Robert B. Smith, and Messrs. Maury & Hogevoil, for Respondent.

As to the duty of the defendant to inspect its wires, see *Western Union Co. v. State*, 82 Md. 293, 51 Am. St. Rep. 464, 33 Atl. 763, 31 L. R. A. 572; *Mitchell v. Charleston etc. Co.*, 45 S. C. 146, 22 S. E. 767, 31 L. R. A. 577; *Excelsior Electric Co. v. Sweet*, 57 N. J. L. 224, 30 Atl. 553; *Thurton v. Powellton Electric Co.*, 185 Pa. St. 406, 39 Atl. 1053; *Dwyer v. Buffalo etc. Co.*, 20 App. Div. 124, 49 N. Y. Supp. 1134.

A partial list of the authorities supporting the contentions of respondent is as follows: *Haynes v. Raleigh etc. Co.*, 114 N. C. 203, 41 Am. St. Rep. 786, 19 S. E. 344, 26 L. R. A. 810; Shearman and Redfield on Negligence, par. 698; *Excelsior Electric Co. v. Sweet*, 57 N. J. L. 224, 30 Atl. 553; *Arkansas Tel. Co. v. Rattersee*, 57 Ark. 429, 21 S. W. 1059; *Henning v. Western Union Tel. Co.*, 41 Fed. 864; *South Western Co. v. Robinson*, 50 Fed. 810, 1 C. C. A. 684; *McCay v. Sutherland etc. Co.*, 111 Ala. 337, 56 Am. St. Rep. 59, 19 South. 695, 31 L. R. A. 589; *Ahern v. Oregon Co.*, 24 Or. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635; *Ennis v. Gray*, 87 Hun, 355, 34 N. Y. Supp. 379; *Giraudi v. Electric Co.*, 107 Cal. 120, 48 Am. St. Rep. 114, 40 Pac. 108, 28 L. R. A. 596; *Myhan v. Louisiana Electric Co.*, 41 La. Ann. 964, 17

Am. St. Rep. 436, 7 L. R. A. 172, 6 South. 799; *Griffin v. United etc. Co.*, 164 Mass. 492, 49 Am. St. Rep. 477, 41 N. E. 675, 32 L. R. A. 400; *Western Union Tel. Co. v. Thorn*, 64 Fed. 287, 12 C. C. A. 104; *Suburban Electric Co. v. Nugent*, 58 N. J. L. 658, 34 Atl. 1069, 32 L. R. A. 700; *Uggla v. Westend*, 160 Mass. 357, 39 Am. St. Rep. 481, 35 N. E. 1126; *Western Union Tel. Co. v. Eyser*, 91 U. S. 495, 23 L. Ed. 377; *Denver Consolidated El. Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; *Block v. Milwaukee*, 89 Wis. 371, 46 Am. St. Rep. 849, 61 N. W. 1101, 27 L. R. A. 365; *Kansas City v. Gilbert*, 65 Kan. 469, 70 Pac. 350; *Griffith v. New England Co.*, 72 Vt. 441, 48 Atl. 643, 52 L. R. A. 920; *Clements v. Louisiana Electric Co.*, 44 La. 692, 32 Am. St. Rep. 348, 11 South. 51, 16 L. R. A. 43 (the first and leading case); *Gulf etc. Co. v. Kelly* (Tex. Civ. App.), 34 S. W. 140; *Johnson v. Oregon S. L.*, 23 Or. 94, 31 Pac. 283; *Consolidated etc. v. Tinchert*, 5 Kan. App. 130, 48 Pac. 889; *Coal and Mining Co. v. Britton*, 3 Kan. App. 292, 45 Pac. 100; *Croswell on Electricity*, par. 266; *Union Pacific Ry. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 436; *Kraatz v. Brush Electric Co.*, 82 Mich. 457, 46 N. W. 787; *Thomas v. Western Union Tel. Co.*, 100 Mass. 156; *Keasby's Electric Wires*, par. 166; *United States Illuminating Co. v. Grant*, 55 Hun, 222, 7 N. Y. Supp. 788; *Perham v. Portland etc. Co.*, 33 Or. 451, 53 Pac. 14; *Black's Law Accident Cases*, p. 38; 1 *Thompson on Negligence*. 2d ed., par. 797; *Black on Law and Practice Accident Cases*, par. 181; *Exodus xxi*: 28-31; *Texarkana Gas etc. Co. v. Orr*, 59 Ark. 215, 43 Am. St. Rep. 30, 27 S. W. 66; *Cooke v. Wilmington*, 9 Houst. (Del.) 306, 32 Atl. 643; *Graham v. Boston*, 156 Mass. 75, 30 N. E. 170.

The verdict was not excessive (*Harrold v. New York P. R. Co.*, 24 Hun, 184; *Hall v. Chicago etc. Co.*, 46 Minn. 439, 49 N. W. 239; *Chicago etc. v. Holland*, 18 Ill. App. 418; *Albert i v. New York etc. Co.*, 43 Hun, 421; *Ehrman v. Brooklyn City*, 38 N. Y. St. Rep. 990, 14 N. Y. Supp. 336; *Shaw v. Boston etc. Co.*, 8 Gray, 45; *Walker v. Erie R. Co.*, 63 Barb. 260; *International Co. v. Brazil*, 78 Tex. 314, 14 S. W. 609.)

STATEMENT OF THE CASE, BY THE JUSTICE DELIVERING THE
OPINION.

This action was commenced in Silver Bow county by the plaintiff, Bourke, to recover damages for personal injuries received by him by coming in contact with an electric light wire charged with electricity. The defendants originally were the Butte Electric and Power Company, the Butte Lighting and Power Company, the Butte General Electric Company, and George T. Aiken. Afterward, on plaintiff's motion, the action was dismissed as to the Butte Lighting and Power Company and the Butte General Electric Company, and proceeded thereafter against the Butte Electric and Power Company and George T. Aiken.

The complaint alleges that the defendants were engaged in the business of furnishing light by electricity to the citizens of Butte and Meaderville in Silver Bow county. Paragraph V of the complaint is as follows: "That on or about the first day of May, 1902, near Meaderville, in the said county of Silver Bow, Montana, the said defendants did cause to be hanged, about three feet above and across a trestle at the East Colusa mine, a certain copper wire, and charged the same with, and continued at all times thereafter to keep the same charged with, a current of electricity of a voltage of about two thousand five hundred volts, that being sufficient in power to kill men of ordinary vitality, and to do great bodily harm to all men, whenever they might touch the same; that the said wire, on the 10th day of May, 1902, and long prior thereto, was insufficiently, carelessly and negligently insulated, and that the defendants were well aware of the said want of insulation, or could with reasonable diligence or care have been aware of such want of insulation."

It is further alleged that the wire mentioned in paragraph V was hung by the defendants, or by them permitted to hang, over and across said trestle so low that persons working over the trestle were in imminent danger of coming in contact with

the wire; and that the wire was so low that it had to be moved and lifted up by persons working on the trestle. It is further alleged that this trestle belonged to the Boston and Montana Company, and that on the 10th day of May, 1902, this plaintiff, while in the employ of that company, was there lawfully hauling waste in tram cars along and over this trestle.

Paragraph VII of the complaint is as follows: "That the defendants, when they hung the said wire over the said trestle, and only about three feet above the said trestle, and without insulation as aforesaid, well knew that this plaintiff and many other men employed by the said mining company, were daily employed in walking over the said trestle and must in the course of such employment touch the said wire."

It is further alleged that in order for plaintiff to get his cars back and forth along the track on this trestle, it was necessary for him to lift up said wire every time he passed, and that the defendants knew that it was necessary for him to do so, and that plaintiff did not know that this wire was in any manner charged with an electric current. It is alleged that the placing of this wire over the trestle so low, and the placing of it there without proper insulation, constituted acts of gross negligence and malicious recklessness on the part of the defendant company.

It is further alleged that on the 10th day of May, 1902, it was raining; that the trestle was wet, and that, as plaintiff was pursuing his business and passing back and forth with his car, in attempting to lift the wire to let his car go by he touched the wire with his left hand; that the wire was then charged with electricity; that a current of electricity passed through him, caused him to hold on to the wire, burned all the flesh from the fingers and thumb of his hand, and otherwise caused him great pain and terrible anguish; that by reason of this injury he was confined to a hospital for eighteen weeks under the care of a physician; that he suffered daily great bodily pain; and that the injuries inflicted upon him are permanent; that before the accident he was a strong and healthy man, capable

of earning, and did earn, \$3.50 a day; that by reason of this accident he will never be a strong man again; that he cannot open his left hand, because of the fact that the muscles on the inside thereof were burned off; that the muscles of his legs and arms have become shrunken; that he continues to suffer pains throughout his body; that he is informed and believes that he will never be relieved of these; that by reason of the burning he has been rendered so weak that he cannot eat anything but soft food; that at the time of the burning he was about forty-five years of age; that since that time he has not been able to do any work or earn any money, and that he will never again be able to do any work, by reason of such injury.

It is further alleged that the acts of the defendants as set forth were done maliciously and wantonly, and in criminal disregard of the rights and safety of all persons, and particularly of this plaintiff. Actual damages in the sum of \$30,000 are asked, and punitive damages in the sum of \$20,000 in addition thereto.

The answer denies that either or any of the defendants, except the Butte Electric and Power Company, was engaged in the business of furnishing light by electricity to the citizens of Butte and Meaderville, as charged in the complaint. There are specific denials that the wire mentioned in the complaint, strung over the trestle, was insufficiently or carelessly insulated, or that it was ever necessary for the plaintiff to lift the wire in hauling his car over the trestle, or that the plaintiff did not know that the wire was charged with an electric current. There is a denial of any knowledge or information sufficient to form a belief as to whether or not the plaintiff was injured, or the extent or character of his injuries. There is a further denial that because of any act or thing done by the defendants, or either of them, the plaintiff was injured in any manner or at all. There is also a denial that any of the acts alleged in the complaint as having been performed by the defendants, or either of them, were done or performed maliciously or wantonly, or in criminal disregard, or any disregard, of the right of plaintiff or any person.

The answer also contains allegations to the effect that over the trestle were strung two wires, one a primary wire, six and five-sixths feet above the trestle, and a secondary wire, four and one-half feet above the trestle; and it is alleged that the accident to the plaintiff was occasioned by the plaintiff taking hold of said primary wire and said secondary wire at one and the same time. It is alleged that it was not necessary for the plaintiff to take hold of either of these wires, and that his taking hold of either of them, or both at the same time, were acts of negligence on his part, which contributed to the injury which he received.

With relation to the principal allegations of the complaint in paragraph V, set forth in full above, the denials in the answer are so pregnant with admissions, that they are set forth at length, as follows: "Deny that on or about the first day of May, 1902, or at any other time, near Meaderville, in said county of Silver Bow, or elsewhere, any of said defendants above named, save and except the Butte Electric and Power Company, did cause to be hanged three feet, or any number of feet above or across a certain trestle at the East Colusa mine, or elsewhere, a certain copper wire, or charged the same with, or continued at any time thereafter to keep the same charged with, a current of electricity of a voltage of about two thousand five hundred volts, or any number of volts, or at all, or that any wire hanged by said defendants, or by either of them, save and except the Butte Electric and Power Company, was sufficient in power to kill men of ordinary vitality, or to do gross or any bodily harm to all men, or any men whenever they might touch the same, or otherwise, or at all.

"Deny that said defendants or either of them, ever at any time strung or hanged said wire mentioned in said complaint, or any wire, or at all, over said or any trestle, only three feet, or about three feet, above said trestle; but in this connection and as a part of this denial defendants allege that a certain wire strung by the Butte Electric and Power Company, was so strung over and above said trestle a distance of four and one-half feet from said trestle, and called a secondary wire."

There is not any denial whatever of the allegations of paragraph VII set forth above.

The cause was transferred to Lewis and Clark county, where it was tried to the court sitting with a jury. The jury returned a verdict in favor of the plaintiff and judgment was entered thereon. The appeals are from the judgment and from an order denying defendants' motion for a new trial.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

1. The cause was apparently tried upon the theory that there was an issue raised by the pleadings as to whether the wire which caused the injury to plaintiff was placed in a position before the trestle upon which plaintiff was at work was erected. The most casual reading of the pleadings will show at once that there was not any issue upon this question at all. The complaint in paragraph V above, in plain and unmistakable language, charges that the defendants on or about the 1st day of May, 1902, hung this wire, charged with an electric current of two thousand five hundred volts, over and above and across a trestle at the East Colusa mine. The denial of those allegations is, that any of the defendants, except the Butte Electric and Power Company, hung the wire mentioned in the complaint over and above or across the trestle at the East Colusa mine; and that any of the defendants hung the wire mentioned in the complaint only three feet or about three feet above said trestle. The answer alleges that a *certain wire* hung by the Butte Electric and Power Company was so hung over and above said trestle, a distance of about four and one-half feet from said trestle, and was called a secondary wire. These pregnant denials admit that the Butte Electric and Power Company strung the wire mentioned in the complaint, charged with an electric current of two thousand five hundred volts, over the trestle at the East Colusa mine. The only denial is that such wire was only three feet or about three feet above the trestle.

If the trestle was not there before the wire was placed in position, it is hardly necessary to say that the wire could not have been strung over and across the trestle, and therefore the answer unmistakably admits the existence of the trestle before the wire which caused plaintiff's injury was placed in position.

The particular wire which caused the injury is definitely identified in the proof as a primary wire; so that the trial court would have been justified in stating to the jury that there was not any issue upon the question, but that the answer admits that this wire with which plaintiff came in contact was placed in position after the trestle upon which he was working was erected. But the defendants offered proof tending to show that there were four wires stretched over this trestle; that two of them were primary and two secondary wires; that the primary wires were charged with an electric current of from two thousand to two thousand five hundred volts, while the secondary wires were charged with only about one hundred and four volts, which was not sufficient to have caused the injury complained of.

Acting upon the assumption that there was an issue as to whether the wire or the trestle was first put in place, the court submitted to the jury certain instructions of which complaint is made. One of these instructions (No. 9) was asked by the defendants and given by the court with a material modification. By this instruction the jury were told that if they found from the evidence that the wire which caused the injury to plaintiff was strung by the defendants before the trestle was erected; that the trestle was erected by a third person without the knowledge or consent of the defendants, and was not used by the defendants, and that plaintiff was at work on the trestle for some person other than the defendants; and that the defendants did not know that the trestle was being used; and if they further found that the wire which caused the injury was strung a sufficient height above the surface of the ground to render it impossible for persons at work or traveling in that vicinity to come in contact with it by ordinary means, then

the act of plaintiff in coming in contact with the wire was contributory negligence on his part which would preclude his recovery. To this extent the instruction was asked by the defendants, but the court attached to it this modification: "Unless you find that the said defendants were guilty of negligence in not inspecting their property at such reasonable periods of time as would enable them to know and discover that said trestle had been erected under their said wires and was being used as a passageway by human beings, and that the erection of said trestle had brought the said wires so close to persons passing across said trestle as to be dangerous to the lives and safety of human beings."

The court, by instruction No. 12, told the jury that if they should find from the evidence that the wire which caused the injury was strung before the trestle was erected, then they were instructed that it is the duty of persons or corporations transmitting electric currents that are dangerous to human safety or life, to inspect their properties at reasonable intervals with a view of ascertaining what, if any, physical changes have taken place which might create or increase danger to human life; and in this case, if the jury should find that the property was not inspected at reasonable intervals, and that a reasonable inspection would have disclosed the existence of the trestle and the physical conditions surrounding it at the time the plaintiff was injured, then, in that event, the defendants were charged with knowledge of the existence of the trestle.

Objection is made to instruction No. 9 as modified, and to No. 12, in that they impose upon the defendants the duty of inspecting their lines of wire, even if the trestle was erected after the wire which caused the injury was strung. Appellants contend that if it was found that the trestle was erected after the wire was put in place, then, as to the defendants, the plaintiff was a naked trespasser, and, as to him, the defendants did not owe the duty of inspection, and in support of this cite *Egan v. Montana Central Ry. Co. et al.*, 24 Mont. 569, 63 Pac. 832, *Beinhorn v. Griswold*, 27 Mont. 79, 94 Am. St. Rep. 818, 69

Pac. 557, 59 L. R. A. 771, and *Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 373. But the complaint alleges that the plaintiff was rightfully and lawfully in pursuit of his business at the time when, and place where, he was injured, and this is not denied. Neither is there anything in the pleadings or proof which would even tend to show that the owner of the trestle was, as to the owner of the wire, a trespasser.

The wire was strung on and along a public street, and the trestle was built across the street at right angles with the course of the line of wire. As said before, the answer specifically admits that the wire was strung after the trestle was erected; but if it be said that all parties proceeded in the trial court upon the theory that there was an issue raised as to this fact, still there is not anything which would justify the conclusion that either the owner of the wire, or the owner of the trestle was, as to the other, a trespasser. The law will not presume it, but, in the absence of any showing to the contrary, the presumption is that each alike was there lawfully. So that we may at once dismiss from our consideration any contention that the owner of the trestle was a trespasser; and this being so, the cases cited above from this state are not in point here. Defendants' liability to the plaintiff must, therefore, be determined by rules applicable to one injured by the alleged negligence of another, where the injured party was rightfully pursuing his business or pleasure at the time of his injury.

In 3 Current Law, 1182, the rule as to this liability is announced as follows: "While one furnishing electricity is not an insurer, yet as to the public he is obliged to use the utmost human care, vigilance, and foresight, reasonably consistent with the practical operation of his plant, to provide against all reasonably probable contingencies, the care required in any particular case being proportional to the danger. This includes the use of the best mechanical contrivances and inventions in practical use, perfect insulation at all places near which people have a right to go, and it has been held, perfect insulation of all overhead wires strung through streets, the consideration of climatic

conditions, and the maintenance of such a system of inspection as will insure reasonable promptness in the detection of defects."

While this rule goes farther than it is necessary for us to go in this instance, we do adopt and approve it to the extent that it holds the owner or operator of an electric plant to a reasonable degree of care in erecting pole lines, selecting appliances, insulating the wires wherever people have a right to go and are liable to come in contact with them, and in maintaining a system of inspection by which any change which has occurred in the physical conditions surrounding the plant, poles or lines of wire, which would tend to create or increase the danger to persons lawfully in pursuit of their business or pleasure, may be reasonably discovered. (*Mitchell v. Charleston L. & P. Co.*, 45 S. C. 146, 22 S. E. 767, 31 L. R. A. 577.)

Other courts announce the rule in even stronger terms. For instance, in Colorado, it is said: "Moreover the court in other instructions correctly declared that the defendant was bound to exercise the highest skill, most consummate care and caution, and utmost diligence and foresight in the construction, maintenance, and timely inspection of its entire plant which was attainable, consistent with the practical conduct of its business according to the best known methods of the state of its art at and prior to the time of the disaster." (*Denver Con. Electric Co. v. Lawrence*, 31 Colo. 301, 73 Pac. 39.)

And in Pennsylvania the rule respecting the duty of a gas company is stated as follows: "While no absolute standard of duty in dealing with such agencies can be prescribed, it is safe to say in general terms that every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken. This would require in the case of a gas company, not only that its pipes and fittings should be of such material and workmanship, and laid in the ground with such skill and care, as to provide against the escape of gas therefrom when new, but that such system of inspection should be maintained as would insure reasonable promptness in the detection of all leaks that might occur from the deterioration of the material

of the pipes, or from any other cause within the circumspection of men of ordinary skill in the business." (*Koelsch v. Philadelphia Co.*, 152 Pa. St. 355, 34 Am. St. Rep. 653, 25 Atl. 522, 18 L. R. A. 759.)

It would hardly do to say that the defendant can only be required to exercise due diligence after it receives notice of any defect in its appliances or of any change in the physical conditions surrounding them, for this would be placing a premium upon negligent ignorance, as was said, in substance, by the supreme court of South Carolina in *Mitchell v. Charleston L. & P. Co.* above. (*District of Columbia v. Woodbury*, 136 U. S. 463, 10 Sup. Ct. 990, 34 L. Ed. 472.)

Under the rule which we have announced above, we think the court's instructions No. 9 as modified, and No. 12 as given, correctly state the law.

2. The court also gave an instruction, numbered 5, of which complaint is made. That instruction is as follows: "The court instructs the jury, that all persons or corporations who handle a force of great inherent danger to the lives and safety of others, are held by law to a high degree of care in handling the same, to the end that other persons shall not be hurt by the same, while such other persons are not trespassing and are rightfully minding their own business; in other words, the care required is measured by and equal to the danger; when anyone handles a force of utmost danger, a very great care is required; what would be care in handling a force of little danger might not be care in handling a force of great danger and might be negligence in handling such a force; as the danger increases, so the degree of care increases which is required of persons who are handling the force; the degree of care required is proportionate to the danger of the force, and where a force of highest danger is handled, a very high degree of care is required in handling the said force to the end that no other person lawfully minding his own business and not trespassing may be hurt by the force." We think this instruction correctly states the law.

In *Commonwealth Electric Co. v. Melville*, 210 Ill. 70, 70 N. E. 1052, it is said: "Electricity is a subtle and powerful agent. Ordinary care exercised by those who make a business of using it for profit to prevent injury to others therefrom, requires much greater precaution in its use than where the element used is of less dangerous character. As there is greater danger and hazard in the use of electricity, there must be a corresponding exercise of skill and attention for the purpose of avoiding injury to another, to constitute what the law terms 'ordinary care.' The care must be commensurate with the danger."

In *Hoye v. Chicago M. & St. P. Ry. Co.*, 46 Minn. 269, 48 N. W. 1117, the Minnesota court states the rule as follows: "Reasonable care is all that is required. But this must be proportionate to the risks to be apprehended and guarded against." This language is quoted with approval by the same court in the later case of *Gilbert v. Duluth Gen. E. Co.*, 93 Minn. 99, 106 Am. St. Rep. 430, 100 N. W. 653.

The same rule in practically the same terms is announced by other courts and text-writers as follows: "It would have been safer and the better practice to instruct the jury—which ought hereafter to be observed—even in cases like the one before us, that the defendant was bound to exercise that reasonable care and caution which would be exercised by a reasonably prudent and cautious person under the same or similar circumstances. In addition to this, the jury should have been instructed that the care increases as the danger does, and that, where the business in question is attended with great peril to the public, the care to be exercised by the person conducting the business is commensurate with the increased danger." (*Denver Con. Electric Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566.)

"An electric light company is bound as to the public exercise the utmost degree of care in the construction, inspection, repair and operation of its apparatus and appliances; or, disregarding distinctions as to degrees of care, the rule may be thus stated: To prevent an injury to the public, the law requires that usual

and ordinary care should be used, which, in such a business as an electric light company operates, requires and demands a degree of care and diligence proportionate to the danger or mischief that is liable to ensue. The words 'usual and ordinary care' mean in such cases nothing more or less than that if there be great danger and hazard in the business, there should be a corresponding degree of skill and attention required by the law." (10 Am. & Eng. Ency. of Law, 872.)

"Electric companies are bound to use 'reasonable care in the construction and maintenance of their lines and apparatus—that is, such care as a reasonable man would use under the circumstances—and will be responsible for any conduct falling short of this standard.' This care varies with the danger which will be incurred by negligence. In cases where the wires carry a strong and dangerous current of electricity, and the result of negligence might be exposure to death or most serious accidents, the highest degree of care is required." (*City Electric St. Ry. Co. v. Conery*, 61 Ark. 381, 54 Am. St. Rep. 262, 33 S. W. 426, 31 L. R. A. 570.)

"The measure or degree of care required of electrical companies is variously defined, but it is conceived that the consensus of opinion is that they must exercise that reasonable care consistent with the practical operation of their business which would be observed by reasonably prudent persons under like circumstances, increasing the care with any change in conditions likely to increase the danger, and having due regard to the existing state of science and of the art in question." (15 Cyc. 472.)

Many of the cases growing out of alleged negligence by companies handling electricity are reviewed in Keasbey on Electric Wires, sections 242-255, and the doctrine announced is that embodied in instruction No. 5. After all is said, the instruction only announces the familiar rule in negligence cases, that the defendant is required to exercise reasonable care. But what is reasonable care in handling brick and mortar may amount to criminal negligence in handling nitroglycerin; so that the only

rational rule is that announced by the trial court: that the care required is measured by and equal to the danger.

3. By instruction No. 10 the court told the jury that there was not any evidence which would warrant the jury in finding that the defendants had actual notice of the erection of the trestle, and that their wires had been brought in close proximity to it; but that the jury should only consider this in the event that they believed from the evidence that the wire which caused the injury was hung before the trestle was erected; and in the event they believed from the evidence that the wire was strung after the trestle was erected, then the defendants were chargeable with knowledge of the existence of the trestle and the physical conditions surrounding it. If there was any error in this instruction, it was error in the defendant's favor.

4. Upon the trial the plaintiff offered testimony which tended to show that he had lived in Butte about seventeen or eighteen years; that he had worked in and about the mines and reduction works in Silver Bow, Deer Lodge and Granite counties; that he had received from three to four dollars per day, according to the character of work he did; that among others he had worked for one D. H. Dunshee for six or seven years; that in 1901 he was at work in the Pennsylvania mine and worked there for about a year. He was then asked what wages he received there. This question was objected to on the ground that the investigation should be limited to an inquiry as to the wages he was receiving at the time the accident occurred, and that the testimony was irrelevant, incompetent and immaterial. The objection was overruled and error is assigned to this ruling of the court.

We think the objection was properly overruled. It might have occurred that at the time of the injury the plaintiff was not receiving any wages at all, and had not been for some time prior thereto, and, while it would have been competent for this fact to have been made to appear to the jury, it can hardly be said that an injured party under such circumstances would not be entitled to recover anything. Section 4330 of the Civil

Code establishes the measure of damages in cases of this kind, as follows: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not."

In a leading English case upon this subject it is held, that where recovery was sought by a physician for injuries which occasioned loss of time and which impaired his capacity to earn money in the future, the jury might consider proof of the average aggregate of yearly fees received by the physician before his injury. (*Phillips v. London etc. R. R. Co.*, L. R. 5 Q. B. 78, 42 L. T., N. S., 6; *Patterson's Railway Accident Law*, secs. 393-396.) We do not think that the period of time covered by the inquiry in this instance was unreasonable.

5. In the specifications of errors in appellants' brief, under the head "Insufficiency of Evidence to Justify the Verdict," it is stated that the evidence is insufficient to justify a verdict for \$20,000, the amount returned by the jury; but counsel apparently attached little importance to this contention, as their brief does not contain any argument whatever upon the subject. *Kennon v. Gilmer et al.*, 9 Mont. 108, 22 Pac. 448, and *Hamilton v. Great Falls St. Ry. Co.*, 17 Mont. 334, 42 Pac. 860, 43 Pac. 713, are cited, but to what purpose is not just apparent. In each of these cases the verdict was apparently arbitrarily scaled. *Fulsome v. Concord*, 46 Vt. 135, and *Houston H. & T. C. R. Co. v. Willie*, 53 Tex. 318, 37 Am. Rep. 756, are the only other cases cited, and these likewise without any argument or comment whatever.

In *Fulsome v. Concord* the trial court reminded the jury that an allowance for prospective damages is making payment in advance, and in fixing upon a sum for such damages this fact might be taken into consideration and the amount reduced to its present worth. On appeal the supreme court said of this: "As the effect of this suggestion would be to lessen the damages, if it had any effect, the defendant cannot complain of it, and we

find no legal error in it. In respect to the amount of prospective damages to be awarded, the jury are the exclusive judges."

In *Houston etc. Co. v. Willie*, the supreme court of Texas said that compensation for lessened ability to earn money should be made upon the principle that the amount allowed is such as will purchase an annuity equal to the difference between the injured party's annual earnings before his injury, and the amount, if any, he might earn thereafter.

But if these cases are cited in support of some contention which appellants may make, that the jury was improperly instructed upon the method to be employed in determining the amount of damages for impairment of earning capacity in the future, it is sufficient to say that a more definite instruction than that given by the court, was not asked by them. The court instructed the jury that if they found for the plaintiff, then in fixing the amount of damages they might take into consideration mental and physical pain and suffering caused by the injury; wages which plaintiff might have earned from the date of the injury to the date of the trial; and, finally, if they found that the injuries are permanent, they might take into consideration any loss to him by reason of the impairment of his capacity to earn money in the future. No complaint is made of this instruction and none could well be made. We are, however, of the opinion that an instruction particularly informing the jury of the plan or standard to be adopted in estimating damages for impairment of capacity to earn money in the future should be given in all such cases; but, if defendants desired a more specific instruction than that given, they should have asked for it.

We think the rule announced by the Texas court, above, is the correct one, and in fact the only safe guide in fixing such damages. The question in a case of that kind is: What amount will purchase an annuity equal to the difference between the annual wages or salary received by the plaintiff before and after the injury, where the injury is the proximate cause of the im-

pairment of earning capacity? This rule is approved in *Baltimore & Ohio R. Co. v. Henthorne*, 73 Fed. 634, 19 C. C. A. 623; 4 Sutherland on Damages, 3d ed., sec. 1249.

The law does not contemplate that the injured party shall be paid in advance a sum, the interest from which will equal such amount and at his death leave the principal to his estate, but only that he shall not be made to lose because of his injury. From standard mortuary tables and tables made use of by actuaries to determine the cost of a particular annuity, such damages may be ascertained and fixed with some degree of certainty.

However, the elements of physical and mental pain and suffering are entirely uncertain and no fixed standard can be established for ascertaining the damages occasioned by them. The amount must, of necessity, rest in the sound discretion of the jury, and courts are ever reluctant to interfere with the verdict upon the ground that it is excessive or insufficient. The parties are entitled to a verdict from the jury, and courts ought not to substitute their judgments for those of juries, except in those exceptional cases where it manifestly appears that the jurors made a mistake in calculation, considered an item or items of damages which should not have been considered, or abused that sound discretion which by the law is vested in them.

From the testimony given in this case the jury might properly have drawn the conclusion that the plaintiff's earning capacity was totally destroyed by this accident, and that his mental faculties as well were greatly impaired by reason of it.

Had the jury been instructed as to the proper standard for estimating damages for impairment of capacity to earn money in the future, they might, by a reasonable, but not excessive, allowance for mental and physical pain and suffering, have arrived at the amount fixed by their verdict. In any event, the burden of showing error rests upon the appellants, and in the absence of a clear showing, this court would not be justified in interfering upon the ground of excessive damages alone, particularly where, as in this instance, the evidence is such that the jury might well have drawn the conclusion that plaintiff's

injuries are permanent. (13 Cyc. 130, and numerous cases cited.)

We have considered the other assignments, but find no error.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

Rehearing denied December 19, 1905.

STATE, RESPONDENT, v. WELLS, APPELLANT.

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(No. 2,177.)

(Submitted November 10, 1905. Decided November 27, 1905.)

*Criminal Law — Grand Larceny — Evidence — Conspiracy —
Declarations — Cross-examination — Instructions.*

Grand Larceny—Evidence.

1. In a prosecution for grand larceny, of which defendant was charged jointly with two others, evidence which showed knowledge on the part of the defendant and his associates of the prosecuting witness' possession of the property taken; their destitute condition at, and for some time prior to, the date of the crime; an opportunity to commit the theft; the defendant's intimacy with his associates; the fact that one of them had pawned a watch stolen from the prosecuting witness and that defendant furnished the money to redeem it; the deposit by the defendant of bills the same in number and denomination as those stolen; and his inability to explain satisfactorily how he came by them, *held*, sufficient to establish the larceny, and to go to the jury upon the question whether or not defendant was connected with it as an aider or abettor.

Grand Larceny—Evidence—Declarations.

2. While, after the purpose of a conspiracy has been accomplished, evidence of acts or declarations of defendant's associates, as against the defendant, is hearsay, yet where, in a prosecution for grand larceny, information was elicited by the prosecuting witness from one of the associates of defendant, as to the whereabouts of one of the articles stolen, without being told how it came to be at the place indicated, evidence of such information was properly admitted as relevant to the inquiry whether in fact a larceny had been committed.

Grand Larceny—Evidence—Harmless Error.

3. Where, in a prosecution for grand larceny, the principal fact—the larceny—had been established, and the inquiry was as to the defendant's guilty connection with the theft, the admission in evidence of statements made to the prosecuting witness by one of the defendant's associates in the crime, as to the whereabouts of one of the articles stolen, if error, was error without prejudice, since the evidence in nowise incriminated the defendant.

Grand Larceny—Evidence—Cross-examination—Impeaching Witness.

4. The complaining witness in a prosecution for grand larceny was examined before a committing magistrate, his testimony reduced to writing, and signed by him. His statements at the trial showed a discrepancy between his testimony formerly given and the facts then sworn to as to certain particulars. The question was thereupon asked him on cross-examination whether his testimony at the preliminary examination was true or false. *Held*, that the answer to this question was properly excluded, since the purpose of the statute (Code of Civil Procedure, sections 3379, 3380) had been served by calling the discrepancy to the attention of the jury, who were the judges of the credibility of the witness.

Grand Larceny—Instructions.

5. Defendant in a prosecution for grand larceny may not complain on appeal that an instruction, to the effect that the question whether he was an accomplice with his associates in the crime, or either of them, was solely for the jury to determine, had not been given in the exact form requested by him, if one in substance to that effect was submitted.

Appeal from the District Court, Chouteau County; John W. Tattan, Judge.

WILLIAM W. WELLS was convicted of grand larceny. From the judgment and an order denying him a new trial he appeals. *Affirmed.*

Mr. F. E. Stranahan, for Appellant.

Mr. Albert J. Galen, Attorney General, and *Mr. W. H. Poorman*, Assistant Attorney General, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant was by information charged jointly with his brother Samuel E. Wells, and one Frank Allen, with the crime of grand larceny. He demanded and was granted a separate trial, and as a result thereof was convicted and sentenced to a term of four years in the state prison. From the judgment and an order denying him a new trial he has appealed.

The integrity of the judgment is assailed upon the grounds that the verdict is contrary to the evidence; that the court erred in admitting and excluding evidence; and that it prejudiced the defendant by refusing to submit a certain instruction requested.

1. The larceny charged is, that the defendants feloniously took, stole and carried away \$95 in money, of the value of \$95, and a nickel case Waltham watch, of the value of \$30, of the personal property of one J. H. Brady.

The state's theory of the case is, that on February 14, 1904, J. H. Brady and the accused were together, going from one saloon to another in the village of Havre, in Chouteau county, and indulging in drink; and that the three defendants discovering that Brady had the watch and a considerable sum of money upon his person, conceived a plan to steal them from him and did so while he was stupefied by drink. There is a suggestion, also, that he was drugged during the course of the orgy. The evidence is entirely circumstantial.

While not controverting the claim that the property was stolen by Allen, one of the accused, counsel for this defendant contends that the evidence wholly fails to connect him with the taking. This contention we do not think meritorious. While the evidence in this connection is not as convincing as it might be, the incriminatory circumstances proven made out a case for the jury.

It appears that early on the evening in question, Brady and the accused casually met at a saloon. They had had some previous acquaintance, but their relations had not been intimate. They there began to drink. Brady had on his person the watch in question, and \$102 in bills, among which were three of the denomination of twenty dollars, and the rest were of smaller denominations. The accused had no money. The drinking was all at the expense of Brady. That he had the property on his person became known to his associates by the fact that he carried the watch in sight, and during the course of the evening exhibited the roll of money. All of them are

laboring men, but for the time being the accused had no employment and were destitute; indeed, so destitute that for some days they had been dependent for drinks and meals upon the kindness of acquaintances in the village, the defendant and his brother in one or two instances using a borrowed meal ticket. The Wells brothers had been spending their nights in the saloons and sleeping as best they could. During the evening Allen borrowed \$1.25 from Brady. This he spent for drink. They continued drinking until about 2 o'clock on the morning of the 15th, going from place to place. At this time the four left the last place they visited. Brady was much intoxicated. When they had gone a short distance they were seen by the bartender, who seems to have watched them, out in the middle of the street, two of the accused having their arms about Brady, and the other standing near. Brady testifies that about this time he lost consciousness and knew nothing until he woke at his room at the hotel, about 10 o'clock on the morning of the 15th. It appears from other evidence that he went to his hotel and room about 2 o'clock. When he woke and dressed, he found his money and watch gone. He went in search of his associates of the previous night and early morning. He first found Allen and ascertained from him that the watch could be found at a pawnshop. It was found there and shown by other evidence to have been pawned by Allen. Immediately after this conversation between Brady and Allen, the latter went and found the Wells brothers. He obtained money from the defendant to redeem the watch. At the time he preferred his request for the money the defendant demurred, but upon being urged by his brother, finally furnished \$2.50, the amount obtained on the watch by Allen. The conversation among the accused on this subject occurred in the rear of one of the saloons visited on the previous evening and was conducted in whispers.

Early on the morning of the 15th, the defendant went to a saloon kept by one Hinote and deposited with him for safe-keeping \$50 in bills. He had in his possession at that time three twenty dollar bills; one of these he had changed, leaving

the other two with a ten dollar bill. During the morning he and his brother also paid some small bills theretofore contracted for drinks and small amounts in money borrowed at different saloons.

The defendant himself was sworn and testified. His statements tended to contradict in a measure some of the facts detailed by the other witnesses. But his account of the night's doings is vague and contradictory of itself, as well as unreasonable in the light of some significant facts which are clearly established. For illustration: In explaining his possession of the bills next morning, he said that he had been saving the money for some time in order to pay his expenses to The Dalles, Oregon, where he intended to go to shear sheep as soon as the season opened. Though the opportunity was given him to tell the source from which he obtained the money, he failed to do so. He had recently been at Fort Benton, Chouteau county, and had been employed there a short time, but his earnings had been small, and he had left the place without paying for his current board bill, and had borrowed money enough to pay the expenses of himself and his brother to a village in an adjoining county. He explained that he had been keeping the money which was deposited at Hinote's saloon, upon his person, but had concluded that since he had begun to drink, he had better put it in a safe place, so that he would not "blow it in." At the same time he kept out \$10 for spending money.

Upon these facts we cannot say that the verdict is contrary to the evidence. There was knowledge on the part of the defendant and his associates of Brady's possession of the property. There was clear proof of their destitute condition at and for some time prior to the date of the crime. There was likewise the opportunity to commit the theft, and the defendant admitted his intimacy with his associates. There was also the fact, well established by the independent testimony of the pawnbroker, that Allen had pawned the watch early on the morning of the 15th, and that the defendant had furnished him

with the money to redeem it. Coupled with these facts was the deposit by the defendant on the early morning of the 15th of the bills, the same in number and denomination as those in Brady's possession when last seen in his coat, and his inability to explain satisfactorily how he came by them.

The evidence was sufficient not only to establish the larceny, but also sufficient to go to the jury upon the question whether or not the defendant was connected with it as an aider or abettor.

Counsel compares the facts in this case with those in the case of *State v. Whorton*, 25 Mont. 11, 63 Pac. 627, and insists that they are strikingly similar. A just comparison of the two cases, however, reveals a wide difference. The only incriminatory facts shown in that case were an opportunity to commit the theft, though not very convenient, because at all the times when the defendant might have had an opportunity, other persons were present who were above suspicion; the possession by the defendant two or three days afterward of coins of the same denomination as those which were claimed by the prosecuting witness as having been stolen from him; and some slight evidence tending to show that the defendant had stated previous to the larceny, that he was without money.

2. Brady testified as a witness. He stated that on February 15th, when he discovered his loss, he went to seek the accused. He found Allen at a saloon playing cards. The two retired together to a side room and there had a conversation. The court, upon objection, excluded the details of the conversation, but permitted Brady to state that he learned from Allen that the watch was in a pawnshop. Allen gave no information as to how it came to be there. The contention is made that the admission of this evidence was error.

The objection made was "upon the ground that it [the evidence] is immaterial and irrelevant, unless the getting of the watch to the pawnshop is connected with this defendant." It will be noticed that the objection was not made on the ground that the evidence offered was hearsay, and therefore incompe-

tent. It is pregnant with the admission that the evidence was not only competent, but also material and relevant, provided other evidence introduced tended to connect the defendant with the larceny. As against the defendant, any act or declaration of Allen at that time was hearsay and incompetent, for the object of the conspiracy had been accomplished. The rule is elementary, that after the purpose of the conspiracy has been accomplished and the joint enterprise completed, evidence of acts or declarations of one of the co-conspirators is not admissible as against another. Such evidence is hearsay. But the evidence here offered was certainly relevant to the inquiry whether in fact a larceny had been committed. Without proof of this fact a conviction could not be had at all. The other circumstances proven were sufficient to go to the jury, as tending to show the defendant's guilty participation, and we think that the ruling upon the objection, as made, was correct.

But conceding, for the purpose of argument, that it was wrong, it was established by evidence uncontroverted and unquestioned, that the larceny had been committed by some one. It was also established by independent evidence that Allen had pawned the watch. The principal inquiry was whether the defendant had guilty connection with the theft of it. The information imparted by Allen did not tend even remotely to aid this inquiry, and without the aid of other facts, established by independent proof, it did not even tend to inculcate Allen himself. The principal fact—the larceny—having been clearly and indubitably established by evidence other than that in question, and the information imparted to Brady not tending in any way to incriminate the defendant, we think the error, if error at all, was without prejudice.

3. The accused were arrested on February 15th. They were examined by a committing magistrate on the 16th. Brady was at that time examined as a witness. His testimony was reduced to writing and signed by him. There was a discrepancy between his statements at that time and those made at the trial, as to the amount of money he had in the roll of

bills and the amount thereof he had spent during the evening, the question being whether of the \$102 he claimed to have at the time he began to drink with the defendants, he had spent five or ten dollars. After he had identified his written statement and the discrepancy had been called to his attention, he was asked by counsel for defendant: "Is the testimony which you have read from your testimony at the preliminary examination, true or false?" The witness was not allowed to answer. Upon further examination he denied that he had made the statement therein to which his attention had been called. Incidentally, he explained that he was not in condition to testify at the time of the examination owing to the orgy beginning on the night of the 14th. The deposition was introduced in evidence. Complaint is made that the court erred in not permitting the witness to answer. We think there was no error. The purpose sought was to impeach the witness. The discrepancy between his statements on the different occasions was brought clearly to the attention of the jury. It was for the jury to determine whether the witness told the truth, taking into consideration all the circumstances and the explanation of the discrepancy offered by the witness. The right of cross-examination should not be restricted, but the purpose of the statute (Code of Civil Proc., secs. 3379, 3380) is served when the contradiction has been made to appear.

4. The court was requested to instruct the jury that the question whether the defendant was an accomplice with the others charged in the information, or either of them, was solely for them to determine. Complaint is made that this was not done. In this counsel is mistaken. It is true that the instruction was not submitted in the exact form requested by counsel, but it was, in substance, and, taking the charge as a whole, it fairly and fully submitted all the issues in the case.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

CITY OF RED LODGE, APPELLANT, v. MARYOTT, RESPONDENT.

(No. 2,181.)

(Submitted November 27, 1905. Decided December 4, 1905.)

*Cities and Towns—Cattle Running at Large—Ordinances—Construction.**Cities and Towns—Domestic Animals Running at Large—Ordinances—Application to Range Stock.*

1. A city ordinance which makes it unlawful for persons who own or keep certain domestic animals within the city limits, to permit such animals to run at large, has no application to range stock which may stray within the city limits.

City Ordinances—Construction—Livestock Running at Large.

2. Section 1 of a city ordinance made it the duty of persons owning or keeping certain domestic animals within the city limits to provide for keeping them within or upon their premises, and to prevent them from running at large. Section 2 of the ordinance provides for the impounding of *any domestic animals* found running at large within the corporate limits of the city. *Held*, that these two sections must be construed together, and the meaning of the term "*any domestic animals*" determined by reference to section 1, which enumerates the particular kinds of domestic animals which are prohibited from running at large.

City Ordinances—Construction.

3. Ordinances must be construed as a whole, every portion of them given meaning, if possible, and neither the whole nor any portion rendered ridiculous unless that result is unavoidable.

Appeal from District Court, Carbon County; Frank Henry, Judge.

ACTION by the city of Red Lodge against John L. Maryott. From a judgment in favor of defendant, plaintiff city appeals. Affirmed.

Mr. George W. Pierson, for Appellant.

The authority of cities to pass an ordinance like the one in question is undoubted. (*Brophy v. Hyatt*, 10 Colo. 223, 15 Pac. 399; *Amyx v. Taber*, 23 Cal. 370; *Wilson v. Beyers*, 5 Wash. 303, 34 Am. St. Rep. 858, 32 Pac. 90.) The presumption is that all provisions of an ordinance are within the pow-

ers of the city charter, which authorized them. (*Wood v. City of Seattle*, 23 Wash. 1, 62 Pac. 135.) It is the general rule that the same principle of construction applying to statutes applies to ordinances, with the modification that ordinary police regulations, although a penalty be attached, are not subject to so close a scrutiny. (Smith's *Municipal Corporations*, sec. 540; *Johnston v. Central District Tel. Co.*, 23 Pa. Super. Ct. 381.) The intention of the enacting body must be discovered, and, if possible, respected, and statutes should be interpreted in the light of the objects and purposes that the legislature has in view in its enactment. (*Power v. Choteau Co. Commrs.*, 7 Mont. 87, 14 Pac. 658; *State v. Canvassers of Choteau Co.*, 13 Mont. 49, 31 Pac. 879; *Territory Commrs. v. Cascade Co. Commrs.*, 8 Mont. 409, 20 Pac. 809, 7 L. R. A. 105; *Sloan v. Hubbard*, 34 Ohio St. 538.)

A town ordinance to restrain animals running at large within the corporate limits applies to animals belonging to persons residing without the limits of the corporation. (*Roberts v. Ogle*, 30 Ill. 459, 83 Am. Dec. 201; *Gosselink v. Campbell*, 4 Iowa, 296; *Spitler v. Young*, 63 Mo. 42; *Rose v. Hardee*, 98 N. C. 44, 4 S. E. 41; *Wilson v. Beyers*, 5 Wash. 303, 34 Am. St. Rep. 858, 32 Pac. 90; *Folmar v. Curtis*, 86 Ala. 354, 5 South. 678; *Whitefield v. Longest*, 28 N. C. 268.) Proceedings under impounding ordinances are *in rem*, and rest upon the seizure of the animals. It is only the property that is dealt with; no personal liability attaches to the owner. It is enough that they are found within the town or city. (*Gosselink v. Campbell*, 4 Iowa, 296; *Sloan v. Hubbard*, 34 Ohio St. 583; *Wilson v. Beyers*, 5 Wash. 303, 34 Am. St. Rep. 858, 32 Pac. 90; *Fort Smith v. Dodson*, 46 Ark. 296, 55 Am. Rep. 589; *Schauf v. City of Paducah*, 90 Am. St. Rep. 220, note, subd. E, authorities cited; *Dorton v. Burks*, 99 Mo. App. 165, 73 S. W. 239; *Conway v. Jordan*, 110 Iowa, 462, 81 N. W. 703.) The city had authority to sell the stock in question to satisfy the fines and charges provided under the ordinance. (Dillon on *Municipal Corporations*, sec. 351, note 3; *Kennedy v. Sowden*, 1 McMull. 328; *McKee v. McKee*, 8 B. Mon. 433; *Crosby*

v. *Warren*, 1 Rich. 385; *Kinder v. Gillespie*, 63 Ill. 88.) Defendant cannot be heard to complain that the ordinance does not in express terms provide that permitting stock to run at large is unlawful and provide a penalty for its violation. (*Fort Smith v. Dodson*, 46 Ark. 296, 55 Am. Rep. 589.) If the ordinance provided that it is unlawful to permit cattle to run at large and fixed a penalty for its violation, its terms could not apply to the defendant, as he resides beyond the jurisdiction of the city. It is sufficient that the ordinance provided for the seizure and sale of the animals. (*Brophy v. Hyatt*, 10 Colo. 223, 15 Pac. 399; *Gosselink v. Campbell*, 4 Iowa, 296; *Sloan v. Hubbard*, 34 Ohio St. 583; *Burdett v. Allen*, 35 W. Va. 347, 34 Am. Dec. 862, 13 S. E. 1012, 14 L. R. A. 337; *Dillon on Municipal Corporations*, sec. 350; *Julienne v. Mayor of Jackson*, 69 Miss. 34, 30 Am. St. Rep. 526, 10 South. 43; *Blair v. Forehead*, 100 Mass. 136, 97 Am. Dec. 81, 1 Am. Rep. 94; *Nehr v. State*, 35 Neb. 638, 53 N. W. 589, 17 L. R. A. 771; *Haller v. Sheridan*, 27 Ind. 494; *Gilbert v. Stephens*, 6 Okla. 673, 55 Pac. 1070; *Tucker v. Constable*, 16 Or. 407, 19 Pac. 13; *Grover v. Huckins*, 26 Mich. 476; *Campau v. Langlay*, 39 Mich. 451, 33 Am. Rep. 414.)

Mr. O. F. Goddard, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1893 the town of Red Lodge enacted ordinance No. 28, entitled: "An Ordinance Concerning Domestic Animals Running at Large Within Town of Red Lodge," section 1 of which is as follows: "It shall be the duty of every person owning or keeping domestic animals, to wit: horses, mules, asses, cattle, sheep, goats, swine, within the limits of the town to provide for the keeping of the same within or upon his or her premises at all times, save when necessarily or temporarily passing through the streets, and then such animals must be attended by some one to take care of them and prevent their doing damage to person or property."

Section 2 designates the town marshal as the poundkeeper, and defines his duties as such, some of which are described as follows: "The town marshal shall be poundkeeper of the town, and as such shall provide a pound of suitable character at the expense of the town for the impounding of any domestic animals found running at large within the limits of the town, or found trespassing or doing damage to the property of another. It shall be the duty of the poundkeeper to take such animals into custody, and to notify the owner thereof, and if he does not pay the fine and costs provided by section 4 of this ordinance, the marshal shall file a complaint against the owner."

In 1903 this action was commenced in the police magistrate's court in the name of the city of Red Lodge, against the respondent, John L. Maryott, to recover the sum of \$144—\$48 as fees for impounding twenty-four head of cattle, and \$96, costs of keeping the same within the city pound, and for the further sum of fifty cents per day for each head of cattle so impounded from the time of the commencement of the action until the trial of the same, and for an order that the impounded animals be sold to satisfy the judgment asked for.

The complaint alleges the corporate existence of the city of Red Lodge; that about July 1, 1903, the defendant did keep and permit the animals in controversy to run at large within the city of Red Lodge without his premises and without any person herding or in charge of the same, contrary to the form, force and effect of ordinance 28; that while defendant so permitted his cattle to run at large in violation of said ordinance, the poundkeeper gathered and caused to be gathered the said cattle and placed them in the city pound and still confines them therein. The complaint further sets forth the amount of fees and costs incurred in impounding and caring for the animals.

The defendant answered, admitting the corporate existence of the city of Red Lodge, the impounding of the cattle, and that defendant has not paid the city the amount claimed, or any amount whatever, and denying all the other allegations of the complaint.

Upon the trial the court found the issues for plaintiff and entered judgment against the defendant, from which he appealed to the district court. In the district court the cause was tried to the court sitting without a jury. The court found, first, that the defendant resides four miles from the corporate limits of Red Lodge; second, that the cattle in controversy were turned out in the spring of 1903 on the common range; fourth, that the cattle were found in the city of Red Lodge and a portion of them impounded by the city marshal, and a portion by Ralph Vaill, but this latter portion was taken possession of and retained by the city marshal; fifth, that the animals were not owned or kept within the limits of the city of Red Lodge, but strayed within the corporate limits of said city. As a conclusion of law the court found that the city marshal had no authority to impound the animals, and ordered judgment for the defendant for his costs, from which judgment and an order denying a motion for a new trial plaintiff appeals.

In this court the only question presented which requires any consideration is that involved in the construction of the provisions of sections 1 and 2 of ordinance 28, as set forth above. It is conceded by respondent that the city of Red Lodge might properly pass this ordinance, or an ordinance restraining animals running at large within the city, which would apply to the animals in question; and no contention is made here as to the procedure adopted by the city to carry out the provisions of this ordinance. The only contention of respondent is that this ordinance has no application to the animals in controversy.

The evidence is sufficient to support the findings of the court: that the owner of the animals lives some three or four miles from the city limits; that he turned these animals out on the common range, and that they strayed within the city limits, but were not owned or kept therein. The question for determination then is: Are the provisions of ordinance 28 sufficiently broad to apply to all such domestic animals as are mentioned in the ordinance, which may be found running at large within the city limits, whether owned or kept therein, or owned or kept without the city but which stray within the city limits?

Section 1 of the ordinances makes it the duty of every person owning or keeping certain domestic animals (naming them) within the limits of the town, to provide for keeping the same within or upon his own premises at all times, save when necessarily or temporarily passing through the streets, and then such animals must be attended by some one. This is not equivalent to saying that it shall be unlawful for any of the domestic animals named to run at large within the city limits. The duty of restraining such animals is only imposed upon persons who own or keep them within the city limits, and cannot be extended by implication to anyone else. The language is too plain to require any construction beyond that clearly disclosed by its own terms. It has no application to animals running at large on the common range which may stray within the city limits.

But it is contended that under the provisions of section 2 of this ordinance, the city may be justified in impounding these animals. That section provides that the poundkeeper shall provide a pound for impounding *any domestic animals* found running at large within the city limits. But if this section is to be construed literally and without reference to section 1 of the ordinance, then dogs and cats, being domestic animals, fall within the provisions of the ordinance, and the poundkeeper is required to restrain them. But this ordinance must be construed as a whole, every portion of it given meaning if possible, and neither the whole nor any portion rendered ridiculous, unless that result is unavoidable.

There is no conflict whatever between the provisions of sections 1 and 2, and neither is broader in its terms than the other. Section 1 enumerates the particular domestic animals which are prohibited from running at large. Section 2 creates the office of poundkeeper and defines his duties; and when the question is presented to him whether a particular domestic animal is permitted to run at large, he must determine the question by a reference to section 1, which defines the nuisance to be avoided. That the contention now made was not entertained by the city

attorney when the action was commenced is apparent from the complaint, which was clearly drawn with reference to the provisions of section 1 of the ordinance.

However, this becomes immaterial under our view of the case. As the court found that these cattle were not owned or kept within the city limits, and these findings are justified by the evidence, and this ordinance by its terms does not apply to cattle owned or kept without the city and which may stray within the city limits, the court's conclusion was correct and the judgment and order are affirmed.

The other questions presented do not require any consideration.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

CASES DETERMINED
IN THE
SUPREME COURT
AT THE
DECEMBER TERM, 1905.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. GEORGE R. MILBURN,
THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.

BANK OF ONTARIO, RESPONDENT, v. HOSKINS ET AL., DEFENDANTS; MAGGIE HOSKINS, APPELLANT.

(No. 2,182.)

(Submitted November 28, 1905. Decided December 11, 1905.)

Negotiable Instruments—Consideration—Forbearance to Sue.

Promissory Notes—Want of Consideration—Forbearance to Sue—Demurrer.

1. A general demurrer to an answer in an action on a promissory note was improperly sustained, where the answer disclosed that the appealing defendant signed the note long after its execution and delivery by her codefendant, that she was not liable upon his debts represented by the note, and that she signed it only on condition that action should not be brought against her on the paper until the happening of certain contingencies; since, in order that forbearance to sue may constitute a valid consideration for a contract, the party forbearing to sue must have, as against the party to whom the favor is granted, a *bona fide* claim which might give rise to an action to enforce it.

Contracts—Consideration—Forbearance to Sue.

2. *Obiter*: Forbearance to sue a third person constitutes a valid consideration for a contract.

Appeal from District Court, Flathead County; D. F. Smith, Judge.

ACTION by the Bank of Ontario, a corporation, against Omar and Maggie Hoskins. Judgment was entered in favor of plaintiff. From this judgment defendant Maggie Hoskins appeals. Reversed.

Mr. Thos. D. Long, and Mr. Frank L. Gray, for Respondent.

Messrs. Foot & Pomeroy, and Mr. W. H. Poorman, for Appellant.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The complaint in this action contains two causes of action. As to the second no defense is made or attempted. The first cause of action is upon a promissory note for \$1,000, dated March 4, 1903, and due thirty days after date. It is admitted that this note was executed and delivered by Omar Hoskins on the date which the note bears. It is alleged that the defendant Maggie Hoskins did not sign this note until long after its execution and delivery by her codefendant, Omar Hoskins; that she signed it then at the instance and request of plaintiff, but only upon the terms and conditions set forth in her answer. She alleges that at the time of the execution and delivery of the note by Omar Hoskins, and for a year prior thereto, he had a contract for the construction of an irrigating canal in Malheur county, Oregon, and that it became necessary for him to borrow money, represented by this note, from the plaintiff bank for the purpose of carrying on his work; that this note was given for the money so borrowed by him and for no other consideration; that the money was used by him in his work on the canal; that the defendant Maggie Hoskins had no interest whatever in the contract and did not receive any of the money; that on March 19, 1903, at the instance and request of plaintiff, defendant Maggie Hoskins "signed said note upon the expressed understanding and agreement with said plaintiff that said plaintiff would not sue said defendant Maggie Hoskins thereon until the amount thereof was realized by said Omar Hoskins upon said contract for the construction of said irrigating canal, and that in the event said defendant Omar Hoskins did not pay said note from the amount so realized upon said contract, said defendant Maggie Hoskins should pay the same,

and that suit thereon might then be maintained against said defendant Maggie Hoskins." It is then alleged that she signed the note only upon the condition stated in her answer.

To this answer a general demurrer was interposed and sustained; and, the defendants refusing to plead further, judgment was entered in favor of the plaintiff, from which judgment the defendant Maggie Hoskins appealed.

Only one question is presented here: Do the facts pleaded in the answer disclose a want of consideration for the contract which defendant Maggie Hoskins entered into when she signed the note sued upon? As she signed the note long after its execution and delivery by Omar Hoskins, the consideration for his agreement was, as to her at the date she signed it, no consideration at all. Her answer discloses that at the date she signed the note she was not liable upon the debt of Omar Hoskins represented by the note, and that she signed it fifteen days after the execution and delivery by him, only on condition that she should not be sued until money sufficient to pay the note had been realized by Omar Hoskins from his contract for the construction of the canal, and not then, unless Omar Hoskins did not pay it. As the note by its terms became due thirty days after date, the only effect of this agreement was to postpone the bringing of any action on the note against the defendant Maggie Hoskins until the happening of the contingencies mentioned.

As a general proposition, it is said that forbearance to sue is a sufficient consideration to sustain a contract based thereon, for it operates as an advantage to the person to whom the favor is extended, or as a detriment to the party extending it, or both. But in order that forbearance to sue may constitute a valid consideration for a contract, the party forbearing must have, as against the party to whom the favor is granted, a *bona fide* claim which might give rise to an action to enforce it. Of course, a contract may be made between two persons for the benefit of a third; and if the agreement pleaded in this case had been that the plaintiff would not sue Omar Hoskins until

he should realize upon his contract, this forbearance would have been a sufficient consideration for the contract made by the defendant Maggie Hoskins; but that is not the agreement pleaded. The forbearance in this instance only extended to Maggie Hoskins, and, as against her, the plaintiff had no claim whatever. Therefore, she could not derive any benefit from the bank's forbearance to sue her, and the bank did not suffer any inconvenience or detriment in forbearing to sue, when it could not do so in any event.

As the bank had no claim upon which it could maintain an action against the defendant Maggie Hoskins, its forbearance to sue her was not any consideration for her signing the note. The question is too well settled to require further notice. The authorities in support of our position may be found cited in 9 Cyc. 341, 342.

The answer sufficiently pleaded a want of consideration, which is a perfect defense, if proved. The court erred in sustaining the demurrer to this answer, and the judgment is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

SMITH ET AL., RESPONDENTS, v. PERHAM, APPELLANT.

(No. 2,183.)

(Submitted November 28, 1905. Decided December 11, 1905.)

Sales—Recovery of Purchase Price—Complaint—Sufficiency—Instructions.

Sales—Requisites—Instructions.

1. A requested instruction which told the jury that before a person can recover for goods delivered by him, he must prove a request therefor by the party to whom they are delivered, was properly refused, because recovery may be had if delivery to, and acceptance

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134	242
134	247
134	248
33	309
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of the goods by, the intended purchaser, and a promise, expressed or implied, on the part of the purchaser to pay for them, are shown.

Sales—Recovery of Price—Instructions.

2. An instruction in an action to recover for materials furnished, to the effect that the only question for the jury to determine was whether or not defendant received from plaintiff the goods in controversy, was erroneous, since the mere delivery of goods by one person to another is not of itself sufficient to create a liability for their value; in order to do so, such delivery and acceptance must have occurred under such circumstances as that the law will imply a promise to pay for them.

Sales—Action for Price—Complaint—Sufficiency.

3. A complaint in an action for goods sold, which alleges that during a time specified, plaintiff furnished and delivered to defendant certain goods of a specified value, that defendant received the same and used them for his own benefit, and that he has not paid therefor, states no cause of action, its allegations not being inconsistent with a gift.

Instructions—Prejudicial Error—Presumptions.

4. Prejudice will be presumed from the giving of an erroneous instruction, even if others were given which correctly state the law.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by H. J. Smith and B. Urner, doing business under the firm name and style of Smith & Urner, against William T. Perham. Judgment was entered in favor of plaintiffs. From it and an order denying defendant a new trial, he appeals. Reversed.

Mr. Robert B. Smith, for Respondents.

Messrs. McBride & McBride, and Mr. J. Bruce Kremer, for Appellant.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Omitting the formal parts and the allegations of mere conclusions of law, the complaint in this action alleges: "That during the month of September, 1901, the said plaintiffs furnished and delivered to the defendant, and the defendant received from the plaintiffs, stucco and plaster of paris, of the reasonable value of three hundred twenty-eight (\$328.00) dollars, which the defendant used for his own uses and for his own

benefit. That the defendant has not paid the plaintiffs therefor, or any portion thereof."

The answer denies specifically these allegations of the complaint. The cause was tried to the court sitting with a jury. Among others, the court gave instruction No. 2 as follows: "The court instructs you that the only question to be determined in this case is whether or not the defendant received from the plaintiff the material which the plaintiff claims to have furnished to the defendant. If the defendant received such material from the plaintiff and accepted it, then it is your duty to find for the plaintiff the reasonable value thereof, not exceeding the sum sued for"; and refused to give an instruction asked by the defendant, the material portion of which is as follows: "That before any charge can be made, or any money collected, for goods furnished or delivered, it devolves upon the plaintiff to prove a request by the defendant for the furnishing and delivery of such goods and material."

The jury returned a verdict in favor of the plaintiffs and judgment was entered thereon. From this judgment and from an order denying him a new trial the defendant appealed. Heretofore the appeal from the judgment was dismissed. (*Perham v. Smith*, 32 Mont. 603, 83 Pac. 1118.)

Error is predicated upon the giving of instruction No. 2 above, and the refusal of the court to give the instruction asked by the defendant, herein set forth. Error is also assigned to the giving of instruction No. 1, and to the rulings of the court in excluding certain documentary evidence offered by defendant upon the trial of the cause.

While instruction No. 1 is inartistically drawn, we do not think it is open to the criticisms made upon it. The objection to it is hypercritical. Neither do we think that the court committed error in excluding the proffered testimony.

The instruction asked by the defendant and refused by the court does not correctly state the law. Under the theory of that instruction, before a person can ever recover for goods delivered by him, he must prove a request therefor by the party

to whom they are delivered. This is not necessarily true. He may recover if he shows a delivery to, and acceptance of the goods by, the intended purchaser, and a promise, expressed or implied, on the part of such purchaser to pay for them. For the reason that the instruction was limited altogether too much in its scope, the court did not commit error in refusing to give it.

The principal contention is made with reference to instruction No. 2, given by the court and set forth above. That instruction told the jury that there was but one question to be determined, namely: Did the defendant receive from the plaintiffs the materials in controversy? If so, plaintiffs were entitled to recover therefor the reasonable value of such goods. The court evidently proceeded upon the theory that the complaint states a cause of action, and conformed the instruction to the theory of the case announced in the complaint. If it is only necessary for plaintiffs to deliver goods to defendant, or to deliver them and for the defendant to receive the same, in order to establish a liability on the part of the defendant to pay for the goods, then the instruction was properly given. But is this sufficient? It is elementary that before a plaintiff can prevail, he must put the defendant in the wrong. There is not anything set forth in the complaint inconsistent with the idea that the goods in controversy were intended as a gift. In every instance of a gift there is a delivery by the donor, and an acceptance of the gift and its use for the donee's benefit. Or, again, goods may be sold to one person and at his request delivered to, and accepted and used by, another, and the person accepting and using them will not be liable for their value to the seller. In order to charge the defendant, the complaint must set forth an express contract, or a request, expressed or implied, on the part of the defendant for the goods, or the delivery of the goods by the plaintiff, and a promise, expressed or implied, on the part of the defendant to pay therefor.

In the brief of respondents, who were plaintiffs below, appears this statement: "There is no question between counsel for

appellant and myself as to what constitutes an express or an implied contract. In the case at bar the contract is express." If the contract sued upon was an express contract, the complaint wholly fails to plead it. But this feature alone would not necessarily be fatal, if an implied contract was set forth. But the complaint does not state a cause of action either upon an express or implied contract. (*Conrad Nat. Bank v. Great Northern Ry. Co.*, 24 Mont. 178, 61 Pac. 1.)

The instruction was erroneous, and prejudice will be presumed. It does not improve matters to say that other instructions were given which correctly state the law; for it cannot be determined whether the jury followed instruction No. 2 or not.

The mere delivery of goods by one person to another is not of itself sufficient to create a liability for their value. The delivery to, and an acceptance by, the intended purchaser must have occurred under such circumstances that the law will imply a promise to pay for them. One may not make himself the creditor of another by officiously delivering to such other person goods of whatever character.

As this cause must be remanded for a new trial, attention is called to the insufficiency of the complaint to state a cause of action.

Because of error in giving instruction No. 2 above, the order denying a new trial is reversed, and the cause remanded with direction to grant a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

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DORAIS, RESPONDENT, v. DOLL ET AL., DEFENDANTS; FLEMING, ADMINISTRATOR, APPELLANT.

(No. 2,188.)

(Submitted December 2, 1905. Decided December 18, 1905.)

Appeal—Review—Continuance—Administrators—Presentation of Claims—Rejection—Trial—Evidence—Witnesses—Briefs—Assignments of Error.

Appeal—Amendments—Continuance—District Courts—Discretion.

1. Under Code of Civil Procedure, section 774, it was within the court's discretion to permit an amendment to a complaint after the cause had been called for trial, and deny a motion for postponement, where it did not appear that movant was surprised by the presentation of an issue which he was not prepared to meet, or that he did not meet it with all the evidence available in any event; and, on appeal in the absence of an affirmative showing of prejudice, the assignment of error in this respect will be held without merit.

Administrators—Claims Against Estates—Affidavits.

2. A claim against an estate was supported by an affidavit closing with the words "to the knowledge of said claimant," instead of "to the knowledge of the affiant," the words used in section 2604 of the Code of Civil Procedure. An objection was interposed that the claim was not properly verified. *Held*, that when the claimant acts for himself, the word "claimant" in the affidavit accompanying the claim meets all the requirements of the statute, and that it is only when some one acts in behalf of the claimant that the statement must be "to the knowledge of the affiant."

Same—Claims Against Estates—Founded on Written Instruments.

3. A claim against an estate is not "founded on a bond, bill, note or other instrument," within the meaning of Code of Civil Procedure, section 2607, where it appears to be due upon an oral agreement, the result of which is an account stated.

Same—Rejection of Claim—Indorsement.

4. The presentation of a claim against an estate at the office of the attorney of the estate, in accordance with a published notice to creditors, and the indorsement of the claim by the attorney, under the direction of the administrator, as having been "rejected," and signing the administrator's name, sufficiently comply with Code of Civil Procedure, section 2606, which provides that when a claim is presented to an executor or administrator, "he must indorse thereon his allowance or rejection."

Trial—Assignment—Evidence—Rejection—Objection.

5. An objection to testimony of an assignment of a claim against an estate, which went to *any* testimony as to the assignment, whereas the purpose of counsel in making the objection was to exclude oral evidence of it for the reason that it had been made in writing, was too broad, since, by sustaining the objection as made, proof of the assignment would have been impossible; while it would have been proper to limit the effect of the evidence, counsel for appellant not having so requested, he may not complain of the ruling as made.

Witnesses—Competency—Transactions with Decedents.

6. Under Act of 1897 (Session Laws, 1897, page 245), the assignee of a claim against an estate cannot be a witness in an action against the administrator to recover on the claim.

Trial—Witnesses—Reception of Evidence—Motion to Strike Out.

7. A motion to strike out the testimony of two witnesses is too broad, where the evidence of one of them was competent for a particular purpose.

Assignment—Evidence—Sufficiency—Findings.

8. Evidence of an oral assignment of a claim, to which no legal objection was interposed, was sufficient to justify a finding that the assignee was the owner of the claim, though there was a written assignment which had been lost, and though the best evidence was not introduced.

Appeal—Briefs—Assignments of Error.

9. Errors not assigned in appellant's brief, in accordance with subdivision 3 of Rule X of the Rules of the Supreme Court, but only called to the court's attention on oral argument, will not be considered on appeal.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by D. Dorais against George E. Doll and others. From the judgment and an order denying him a new trial, defendant Con. Fleming, administrator of the estate of T. P. Fleming, deceased, appeals. **Affirmed.**

Mr. Charles O'Donnell, for Appellant.

Messrs. Kirk & Clinton, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was commenced by one Louis Dupuis to recover a balance alleged to be due upon a settlement between the parties for ice sold and delivered by plaintiff to defendants. At the time the transactions occurred out of which the controversy arose, T. P. Fleming, with his codefendants George E. Doll, T. E. Fitzgerald and W. O. Fisk, were dealing in ice in the city of Butte, under the firm name of the "Consumers' Pure Ice Company." During the pendency of the action, Dupuis for value assigned his claim to Dorais, who was substituted as plaintiff in his stead. The three defendants, other

than Fleming, defaulted, and, judgment having been entered against them, the action proceeded against Fleming alone in the name of the assignee. In the meantime Fleming died, and the present defendant, his administrator, was substituted as defendant in the action. Amended and supplemental pleadings were filed to meet the changed relations of the parties. Upon a trial in the district court, plaintiff had judgment. This appeal is from the judgment and an order denying defendant a new trial.

The issue presented by the pleadings and tried by the district court was, whether the estate of T. P. Fleming is liable for the amount of plaintiff's claim, the administrator alleging that it grew out of dealings between Dupuis and the Consumers' Pure Ice Company prior to the time when T. P. Fleming became a copartner.

Error is assigned upon the action of the district court in refusing to grant the defendant a postponement of the trial, in admitting evidence, and in submitting certain instructions to the jury. Contention is also made that the evidence is insufficient to sustain the verdict.

1. When the cause was called for trial the plaintiff, by leave of court, filed an amendment to the complaint, by which he incorporated therein the necessary allegation (Code of Civil Procedure, sections 2604, 2612), that his claim had been presented to the administrator of Fleming for allowance within the time prescribed by law, and had been by him rejected. (Code of Civil Proc., sec. 2604.) Counsel for defendant moved for a postponement of the trial for twenty days to enable him to prepare an amended answer. The ground alleged was surprise; but counsel, though asked by the court to show wherein he was taken by surprise, declined to do so. Thereupon the court overruled the motion, but postponed further hearing until the opening of the afternoon session, when the trial proceeded. Defendant alleges prejudicial error.

Under section 774 of the Code of Civil Procedure the court had discretionary power to permit the amendment under such

terms as it deemed just and proper. This it did. It does not appear that defendant was surprised by the presentation of an issue which he could not meet, or that he did not meet it with all the evidence available in any event. In the absence of an affirmative showing of an abuse of discretion by which prejudice was suffered, the assignment must be held to be without merit. (*Jorgenson v. Butte etc. Co.*, 13 Mont. 288, 34 Pac. 37; *Montana Ore Pur. Co. v. Boston etc. Min. Co.*, 27 Mont. 288, 70 Pac. 1114; *Christiansen v. Aldrich*, 30 Mont. 446, 76 Pac. 1007.)

2. For the purpose of showing that his claim had been presented to the administrator and rejected by him, the plaintiff, over objection of defendant, was permitted to introduce with other evidence the original claim found in the files of the district court in the matter of the estate of T. P. Fleming, with the indorsements thereon. The objections made were that the claim was not properly verified by affidavit, that there was not attached to it a copy of the instrument upon which it was founded, and that it did not appear therefrom that it had been rejected. Error is alleged in this regard.

The claim as presented to the administrator was supported by the affidavits of both Dupuis and Dorais. The affidavit of Dorais was in the form and effect such as is required by section 2604, *supra*, except that it closed with the words "to the knowledge of said claimant," instead of "to the knowledge of the affiant," the words used in the statute. This section permits a claim to be presented by the claimant himself, or by some one in his behalf. When presented by another in his behalf, the accompanying affidavit must set forth the reason why the claim is so presented. In such a case the statements must be to the knowledge of the "affiant." But when the claimant acts for himself, the term "*claimant*" meets all the requirements of the statute, for the affiant and the claimant are one and the same person. The affidavit in question was sufficient. But, to make the matter doubly sure, the claim had the affidavit of Dupuis attached also. To this extent the plaintiff went further than the statute requires, in the absence of a demand by the adminis-

trator of satisfactory vouchers or other proofs in support of the claim under the provisions of section 2604, *supra*. It does not appear that any such demand was made in this instance.

The cause of action stated in the complaint is for a balance due on a settlement between Dupuis and the Consumers' Pure Ice Company, a copartnership consisting of T. P. Fleming and others. The evidence shows that in December, 1899, and February, 1900, the firm—Fleming not then being a member—had entered into written contracts with Dupuis for the sale and delivery of ice; that after delivery to the amount of three thousand two hundred and thirty-nine and one-half tons, these contracts were abandoned, and upon a settlement—not under the terms of the contract, but by way of a compromise by which Dupuis agreed to take less for the amount delivered than he would have been entitled to otherwise—the amount agreed upon as due was \$2,205. It was then orally agreed that this amount should be paid, one-third in March, one-third on May 1st, and the balance on July 1, 1900. The claim thus appears to have been due, not upon the contracts or either of them, but upon the oral agreement, the result of which was an account stated. Such being the case, the claim was not "founded on a bond, bill, note or other instrument," within the meaning of section 2607 of the Code of Civil Procedure, which appellant cites.

Touching the rejection of the claim, it appears that it was presented within the required time, at the office of the attorney of the administrator in accordance with the requirements of the published notice to creditors. The attorney, under the direction of the administrator, indorsed the claim "rejected," and signed the administrator's name. This was a sufficient compliance with the statute. (Code of Civil Proc., sec. 2606.) But, even if the administrator had neglected to indorse it at all, the plaintiff had his option, after the lapse of ten days from the date of presentation, to regard such negligence as a rejection and to proceed accordingly.

Contention is made that the court erred in overruling the defendant's objection to the testimony of one Martin Johnson touching the assignment of the claim by Dupuis to Dorais. This witness testified to a conversation had by Dorais, Fleming and Dupuis in his presence, in which it was agreed that since Dupuis was indebted to Dorais, Fleming might pay to Dorais the amount due to Dupuis from the firm. Fleming agreed for the firm to do this. The objection was: "We object to any testimony being given as to this assignment of this account from Louis Dupuis to D. Dorais." If the court had sustained this objection, the case would have been at an end. The fact that the assignment had been made was put in issue in the pleadings; for it was alleged in the complaint and denied in the answer, and it would have been impossible to prove it whether made orally or in writing. Even if a written assignment had been produced, it would have been necessary to prove its execution by the testimony of some one, before it could have been introduced. The purpose of counsel in making the objection, as appears elsewhere in the record, was to exclude oral evidence of the assignment, for the reason that it had been made in writing. The objection was too broad. The evidence was competent in any event to show an admission of indebtedness by Fleming, and for this reason it should not have been excluded altogether. It would have been proper to limit the effect of the evidence, either by a ruling made at the time or by a suitable instruction submitted to the jury, had counsel so requested. But, as counsel made no such request, he may not be heard to allege error upon the ruling.

Later a motion was made to strike out this testimony of Johnson, and that of D. Dorais upon the same subject, the ground of the motion being in effect the same as that of the objection to the testimony of Johnson. The evidence of Dorais was clearly incompetent, because, being plaintiff in the case as assignee of the claim against the estate, he could not be a witness in the action against the administrator. Even a general objection to his testimony would have been sufficient to exclude it. (Session Laws 1897, p. 245.) But the motion was too broad,

since it included all the evidence of both witnesses. Such being the case and the evidence of Johnson being competent for one purpose, the court was not in error in denying it.

3. The criticism of the instructions made by counsel have to do rather with the sufficiency of the evidence to go to the jury, than with their correctness as propositions of the law applicable to the case. It is not necessary to discuss them further than to remark that, though brief, they fairly submitted the case to the jury upon the issue tried.

4. The evidence was sufficient to go to the jury, though to establish the assignment of the claim in suit by Dupuis to Dorais, the plaintiff did not present the best evidence. The assignment was in writing, but the writing had been lost. This was clearly established. Instead of offering evidence of its contents the plaintiff relied upon the testimony of Johnson and Dorais as to the agreement made by Fleming, Dorais and Dupuis heretofore referred to, and the affidavit of Dupuis attached to the claim presented to the administrator for allowance, in which, besides deposing to the matter required by the statute, Dupuis swore that the claim belonged to Dorais. This evidence was before the jury without legal objection or limitation as to its office in the case, and was sufficient to justify a finding for plaintiff of the fact that he is the owner of the claim.

5. The point was made in the oral argument that the judgment is not in accordance with the verdict of the jury. This point is also argued somewhat in the brief. The contention made is that the verdict of the jury was for \$1,470, without interest, while the court entered judgment for this sum, together with interest from April 23, 1902, at the rate of eight per cent per annum, thus increasing the verdict of the jury without warrant of law to \$1,699. This point is disposed of by the remark that the error, if it be such, is not assigned in the brief in compliance with the requirement of subdivision 3 of Rule X of the Rules of this court, and may not be considered.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

CLEMMONS, RESPONDENT, v. GILLETTE ET AL., APPELLANTS.

(No. 2,236.)

(Submitted November 27, 1905. Decided December 18, 1905.)

*Public Lands—Unlawful Fencing—Trespases—Injunction—
Unsurveyed School Lands—Leasing by State.***Public Lands—Unlawful Fencing—Trespases—Injunction.**

1. By unlawfully enclosing portions of the public domain, a person acquires no such right therein as will enable him to protect his possession against the trespases of another person, by invoking the injunctive power of a court of equity.

School Lands—Leasing by State Prior to Survey—Rights of Lessee.

2. *Obiter*: The state acquires no such right, under its grant of lands from the United States government in aid of common schools, as will enable it, prior to the official survey by the United States and approval of the plat by the commissioner of the general land office, to lease the lands so granted, and thereby give to a citizen of the state an exclusive right to the use and enjoyment of such lands.

Public Lands—Unlawful Fencing—Injunction.

3. Since a person who unlawfully fences a portion of the public domain, thus having only a tortious possession, cannot maintain an action against another for depasturing such land, he cannot have incidental relief, by way of injunction, to restrain the latter from continuing to depasture the land.

Appeal from District Court, Lewis & Clark County; J. M. Clements, Judge.

ACTION by William Clemmons against Warren C. Gillette and George K. Reeder. From an order of the district court refusing to dissolve an injunction *pendente lite*, defendants appeal. Reversed.

Mr. James Donovan, for Respondent.

In the matter of a motion to dissolve an injunction the moving party takes the burden of proof. He is the actor and must make an affirmative showing on his motion. A motion to dissolve an injunction, when the only question involved is a question of law, is rarely, if ever, entertained by the court, for the reason that the same question could be raised by a demurrer to the petition, and it involves purely a question of law, whereas

motions to dissolve injunctions always involve a question of fact. (High on Injunctions, sec. 1470.)

We concede that the land is unsurveyed; we concede that the state could not pass legal title to this land as long as it is unsurveyed; but we do maintain that when the section is so segregated as that it can be identified, the state has a right to grant a permit to occupy said land, and when it grants such a permit to occupy such land and the occupant takes possession of it and improves it, and fences it, he is then in such a possessory right of the land as will authorize him to institute a suit against anyone trespassing upon it; otherwise a person locating upon a piece of government land which is unsurveyed, and having put improvements upon it, and fenced it, and made it productive, is liable to have it taken away from him by force simply upon the theory that might is right, and can be despoiled of his home and improvements; the same may be run over by sheep and cattle, and yet, because it is unsurveyed land, he is absolutely without a remedy; his property may be destroyed and he may be put to irreparable injury, and yet, if the position of the appellants is good, he is absolutely without recourse for the wrongs committed. Such certainly is not the law, never has been, and, we trust, never will be.

In the Session Laws of 1895 there is an Act which provides that anyone who has put improvements upon land which turns out to be state land, or upon section 16 or 36 when unsurveyed, and when surveyed patent issues to the state, the state recognizes their prior right, and will grant to them the right to continue thereon; or in case other than the person putting such improvements on said land is deprived of the same thereafter by others bidding higher than they for the possession of said land, the state adjudicates the improvements and pays over to such person the cost of such improvements; or a stranger may bid as high as he pleases for a permit or lease of such lands and then the occupant may retain the same under a permit at the price bid by the stranger. (Pol. Code, sec. 2339.)

Messrs. Walsh & Newman, for Appellants.

The land in question is unsurveyed and a part of the public domain. Until the land is surveyed and the lines created, designating the sections, the state has not authority to lease or otherwise dispose of the land. It is held that the actual survey of the lands is necessary* to determine their location, that the lines thereof are then created and not established as something theretofore existing. (*Robinson v. Forest*, 29 Cal. 325; *Medley v. Robinson*, 55 Cal. 398; *Finney v. Berger*, 50 Cal. 248; *United States v. Montana L. & M. Co.*, 196 U. S. 573, 25 Sup. Ct. 369, 49 L. Ed. 604; *United States v. Birdseye*, 137 Fed. 516; *Central Pac. R. R. Co. v. Nevada*, 162 U. S. 512, 16 Sup. Ct. 885, 40 L. Ed. 1057; *State v. Central Pacific R. R. Co.*, 21 Nev. 94, 25 Pac. 442; *Buttz v. Northern Pacific Ry. Co.*, 119 U. S. 66, 7 Sup. Ct. 100, 30 L. Ed. 334; *Wisconsin Cent. Ry. Co. v. Price Co.*, 133 U. S. 509, 10 Sup. Ct. 341, 33 L. Ed. 694; *Cragin v. Powell*, 128 U. S. 691, 9 Sup. Ct. 203, 32 L. Ed. 566; 20th Opinions of Attorney General U. S., 542; *Waterman v. Smith*, 13 Cal. 373, 416; *State v. Central Pac. R. R. Co.*, 21 Nev. 260, 30 Pac. 689; *Middleton v. Low*, 30 Cal. 605; *Mahoney v. Van Winkle*, 33 Cal. 448, 458; *Hogaboom v. Eberhardt*, 58 Cal. 233; *Sherman v. Buick*, 45 Cal. 656, 668; *Chapman v. Pollack*, 70 Cal. 487, 496; *Hughes v. Wheeler*, 76 Cal. 233, 18 Pac. 386; *Buchanan v. Nagle*, 88 Cal. 593, 26 Pac. 512; *Schlosser v. Hemphil*, 118 Iowa, 452, 90 N. W. 842; *Illinois Steel Co. v. Budziz*, 115 Wis. 68, 90 N. W. 1019; *Prentice v. Miller*, 82 Cal. 570, 23 Pac. 189; *Linn v. Scott*, 3 Tex. 67.)

Counsel mentions Political Code, section 2339. It is sufficient to say, in reply, that the state has no authority to give any person the right to fence the unsurveyed public domain. The United States government alone has the right to dispose of the public lands. Until they are surveyed, the title remains in the government, and the state could not interfere with the United States government's right of possession, or give any person the right to enclose or trespass upon the land.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This cause is before this court on appeal from an order of the district court of Lewis and Clark county, refusing to dissolve an injunction *pendente lite*. The writ was issued upon the verified complaint alone, which states three causes of action, namely, for a trespass alleged to have been committed by the defendants in the summer of 1903; for a like trespass committed in the winter of 1903 and 1904; and for an injunction to restrain further trespasses, which it is alleged are threatened, until the rights of the parties may be finally adjudged.

The plaintiff in his third cause of action alleges, in substance, that on or about January 1, 1903, he secured from the state of Montana, through the officers of its land department, a lease of section 16, township 16 north of range 3 west, in Lewis and Clark county; that he paid to the state the annual rental therefor, and went into the actual and peaceable possession thereof; that he is now in possession and is, and has been, entitled to such possession since the date mentioned; that within the past thirty days, the plaintiff being in the actual and peaceable possession as aforesaid, the defendants have cut the wire fence erected by plaintiff enclosing said land, have torn down the gates leading to the same, and have removed the lower wire of the fence for the purpose of driving their sheep thereon, and are about to take possession of the land for the season of 1905, and to depasture the same with their sheep; that the defendants, as plaintiff is informed and believes, are insolvent and unable to respond in damages; that the plaintiff has arranged to graze on the said land, for the year 1905, registered cattle and standard bred horses; that he has no other place where he can graze the said cattle and horses; that they cannot be turned out upon the open range without coming in contact with ordinary range stock; that if he is compelled by the action of defendants to turn them upon the open range, it will impair their value and usefulness for breeding purposes for the season of 1905; and that, if the defendants are allowed to continue their

trespasses in breaking down the enclosure aforesaid, the land of the plaintiff will be depastured and the plaintiff will be compelled to allow his said stock to run at large upon the common range, at a loss to him of from \$4,000 to \$5,000.

The complaint was filed and the injunction issued on June 20, 1905. On July 22, 1905, the court heard the motion of defendants for a dissolution of the writ. It was based upon the ground, among others, that the plaintiff had no interest in the lands and premises described in the complaint. The defendants filed a demurrer to the complaint. The motion was heard upon the complaint, affidavits and documentary evidence, the allegations of the complaint being admitted, except that the defendants are insolvent. This is controverted. After consideration of the evidence submitted, the motion was denied. The evidence showed that the lands in controversy are a part of the unsurveyed public domain; that on or about January 1, 1903, the plaintiff, having obtained an alleged lease of them from the register of the state land office, at once entered into possession and erected a four-wire fence, enclosing the lands for the purpose of pasturing the stock mentioned in the complaint; that his lease was renewed for the year 1904, but not for the year 1905, because such renewal, though requested by plaintiff, was refused; and that plaintiff has no other right to the possession than such as he obtained by virtue of his enclosure made under the alleged lease from the state of Montana for the years 1903 and 1904.

The question presented for determination therefore is: Whether a person, by enclosing portions of the public domain, thereby acquires such a right therein as will enable him to protect his possession against repeated trespasses thereon by other persons having an equal right to the use and enjoyment thereof. Incidentally, also, arises the question whether the state acquires such a right, under its grant from the United States government of lands in aid of common schools, as to enable it, prior to the official survey by the United States, and the approval of the plat by the commissioner of the land office of the United States, to lease the lands so granted, and thus give a

right to a citizen of the state to the use and enjoyment thereof, to the exclusion of other citizens.

The question of the right of the state to make sales or valid leases of lands granted to it for school purposes by the United States, prior to the official survey thereof, is referred to as incidental, because the respondent does not, in this court, rely, except incidentally, upon a lease from the state for the protection of his alleged right to the exclusive use of the lands in controversy. He relies mainly upon his actual, peaceable possession of the land as a part of the public domain. He concedes that it is unsurveyed and that, until it is surveyed, the state has no title which it may convey; and this concession we think properly made. For it seems to be the rule, applicable to such grants, that, though they operate for some purposes as grants *in praesenti*, conveying the fee, yet, until the official survey is made and the plat has been approved by the federal authorities, the grant is not effective to vest title to any specific portion of the land described by the designation of section numbers only. (*Middleton v. Low*, 30 Cal. 596; *Medley v. Robertson et al.*, 55 Cal. 396; *Linn v. Scott*, 3 Tex. 67; *United States v. Montana L. & M. Co.*, 196 U. S. 573, 25 Sup. Ct. 367, 49 L. Ed. 604.) Even a partial survey of the particular section is not sufficient to identify it. (*United States v. Birdseye*, 137 Fed. 516.) The reason of the rule is that, until the subject of the grant is identified, there is no particular portion of the great body of lands in which it is included to which the state may assert title, or over which it can exercise exclusive right. The concession logically carries with it the further concession that, for the same reason, the state may not carve out of the subject of the grant a less estate than the fee and convey that. In other words, if it cannot, for the reasons stated, convey the fee, it may not for the same reason grant a lease.

So far as we are aware, the state has never by any legislation assumed, or attempted to assume, control of unsurveyed school lands. So we are relieved of the necessity of discussing further any right of the plaintiff founded upon a lease from the state;

for, though the respondent contends that even if the state cannot convey title, yet, since he went into possession and erected his enclosure under a lease which the state assumed to execute, he is in possession under color of title, it is apparent that this lease could have no efficiency whatever as a protection for his unlawful occupation.

We therefore pass to the question presented for decision, to-wit: May one citizen unlawfully enclose a portion of the public domain and protect his possession, thus acquired and held against the trespasses of another citizen who also has right of entry thereon, by invoking the injunctive power of a court of equity? That the enclosure of the plaintiff is violative of the statute of the United States prohibiting the fencing of public land is clear. Congress has declared unlawful all enclosures of any public lands, in any state or territory, made or maintained by any person, party, association or corporation, without color of title, made or acquired in good faith, or an asserted right thereto, by or under claim made in good faith with a view to entry thereof at the proper land office under the laws of the United States. (Act of February 25, 1885, c. 149; U. S. Comp. Stats. (1901), p. 1524.) The violation of this prohibition is made a misdemeanor, for which severe penalties are exacted. (Id.)

It is practically admitted that the plaintiff has no foundation for his claim to the land in controversy other than his enclosure; nor is it asserted or proved that he expects or intends to acquire title to the land within it from the United States. Indeed, we think it may be assumed that he cannot do so, for the area enclosed cannot be acquired by a single citizen under any provision of the laws of the United States. So he stands before a court of conscience, asserting that he is a trespasser and misdemeanant, without right of possession or color of title, and without hope of acquiring any, and demands that it use its power to aid him in maintaining his unlawful course, and that, too, against a citizen who has the same right of entry that he has himself. No case has been called to our attention in which a

court has used its power for this purpose; and it seems to us that every principle of justice is against it.

The action was not brought for damages for the destruction of the fence or other improvements, but for the depasturing of the land and the consequential injury wrought by plaintiff's being compelled to allow his standard bred stock to run at large upon the common range. The purpose for which the injunction is sought is to prevent further injury of the same kind. The United States government has for many years encouraged its citizens in this western country to use the public domain to pasture their flocks and herds. So long has this condition of affairs prevailed, that it may be said that the government has granted to each citizen a license to go upon and use these pastures. (*Buford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618.) No citizen, then, has a right to take away or destroy or limit this privilege, and if he does so—as plaintiff has done in this case—he should not be heard by a court of equity to allege his wrong as a reason why a court of equity should protect him.

The cases cited by plaintiff are not in point. In *Monroe v. Cannon*, 24 Mont. 316, 81 Am. St. Rep. 439, 61 Pac. 863, this court considered the rights of citizens under the fencing law of this state. The question decided was whether, under the statute (Pol. Code, sec. 3258), one citizen is at liberty to drive his stock upon the land of another and depasture it, though it is not enclosed by a legal fence, as provided by section 3250. It was held that when one person knowingly and willfully appropriates another's land in this way, though it be not fenced at all, he is liable for the damages sustained by the owner. It will be noted that the plaintiff in that case was admittedly the owner of the land in controversy, and that the defendant, knowing this fact, caused his sheep to be herded thereon and depastured it. And so with the other cases cited; none of them recognize the right of one person to sue and recover for damages for injury by others to the lands claimed by him, where such claim is not founded upon some color of title under the laws of the United States, or a settlement with *bona fide* intention to acquire title.

Plaintiff contends that, since he is in the actual, peaceable possession, and the federal government makes no complaint, he is, as against the defendants, the owner of the fee, or, at least, entitled to maintain his possession. He says that the courts will not sanction the enforcement of individual rights by violence, or look with favor upon a citizen who assumes to take the law into his own hands, and, by mere might or power, do what he should invoke the law to do for him; for this course would encourage violence and crime. This is conceded. What we here say has no application to actions at law for injuries to property belonging to the plaintiff; nor to summary actions to recover possession of real estate, the actual, peaceable possession of which is taken or detained from the plaintiff by force accompanied by circumstances of terror, authorized by statute to prevent breaches of the peace. In such cases the title to land is not involved. We think, however, different principles should apply where the plaintiff seeks to recover for damage to land to which he shows he has no other right but a tortious possession. The proprietary title to the public lands is in the United States, and it alone can maintain an action for injury to them. If plaintiff could maintain this action for depasturing this land, he could maintain one for the cutting of timber thereon, or removal of mineral therefrom, upon the strength of his enclosure alone. That he can maintain an action for either of the latter injuries, no one will claim. If the action may not be maintained for the depasturing of the land, then it must follow that the plaintiff cannot have incidental relief by way of injunction.

The order is reversed.

Reversed.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE MILBURN: I concur in the above opinion. Nothing therein contained should be considered as implying at all that the state of Montana has not some property interest in sections 16 and 36 of the unsurveyed government lands. I do not think that the opinion is intended to convey an idea that the

state has no interest, but I think it would be better to say so in plain language.

In 1895, at the time the Codes were passed, it appears to me certain that the Code Commissioners, as well as the legislature, understood that the state had some interest in these sections when unsurveyed, for they made provision in section 3489 of the Political Code (section 2339, same Code, as submitted by the Commissioners), for the benefit of persons desiring to purchase such lands, who had "made improvements thereon prior to March 6, 1891, if the land was surveyed at that time, or if unsurveyed, then prior to the survey." Such legislation certainly was an inducement, if not an invitation, to people to settle upon unsurveyed school lands; and it is hard to suppose that the commissioners and the legislature would intentionally invite or induce a citizen to violate any law of the United States. This section was repealed in 1899, and is now only worth mentioning for what it is worth as going to show that this question of the state having some interest in unsurveyed school lands, has not always been understood to be entirely settled in favor of the United States and against the people of this state.

HARRINGTON, APPELLANT, v. BUTTE AND BOSTON MIN-
ING COMPANY ET AL., RESPONDENTS.

(No. 2,193.)

(Submitted December 4, 1905. Decided December 18, 1905.)

*Negotiable Instruments — Holder in Due Course — Action
Against Administrator—Trial—Evidence—Instructions.*

Trial—Administrators—Evidence—Exclusion—Waiver.

1. In an action against the administrator of an estate to recover on negotiable paper, plaintiff's offered testimony was excluded as incompetent, under the provisions of section 3162 of the Code of Civil Procedure, as amended by Session Laws, 1897, page 245. Proof of decedent's testimony on a former trial was then introduced. The preservation of decedent's testimony had not been made to appear to the court up to the time of its introduction. *Held*, that by failure to renew

his offer after the court had been made cognizant of the preservation of decedent's testimony, plaintiff waived any error in excluding the testimony in the first instance.

Trial—Action Against Administrator—Witnesses.

2. Section 3162 of the Code of Civil Procedure, as amended by Act of 1897 (Session Laws 1897, p. 245), which provides that parties to an action against an executor or administrator upon a claim against an estate of a deceased person cannot be witnesses, precludes plaintiff, in an action against the administrator of an estate to recover on negotiable paper, from testifying to transactions had with a third person, if the proof of such transactions tends to establish plaintiff's claim against the estate.

Negotiable Instruments—Indorsee in Due Course—Instructions.

3. An instruction given in an action on negotiable paper, which told the jury that, where the holder took the paper under suspicious circumstances sufficient to put a reasonably prudent man upon inquiry, notwithstanding he had paid value for it, he could not recover, was erroneous, his ability to recover being dependent under section 4035, Civil Code, not upon the nonexistence of suspicious circumstances, but upon his good faith when he obtained possession of the paper as an indorsee in due course.

Instructions—Evidence—Invasion of Province of Jury.

4. To instruct the jury that certain evidence proves a particular fact is erroneous, in that it invades the province of the jury.

Negotiable Instruments—Bad Faith—Instructions.

5. An instruction which told the jury, in an action to recover on negotiable paper, that if there were any suspicious circumstances attending the purchase of the check in question, the holder was guilty of bad faith, and therefore could not recover, was erroneous, inasmuch as it was for the jury to determine, from the evidence relating to the circumstances surrounding the transaction, whether such evidence in fact proved bad faith.

Trial—Incomplete Instruction.

6. An instruction which submits to the jury certain premises, but fails to state what conclusions might be drawn from such premises, is erroneous.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by Phil. J. Harrington against the Butte and Boston Mining Company and A. J. Leggat, administrator of the estate of John A. Leggat, deceased. From a judgment for defendants and from an order denying his motion for a new trial, plaintiff appeals. Reversed.

Mr. C. M. Parr, for Respondents.

Messrs. Maury & Hogevoil, and Mr. J. E. Healy, for Appellant.

Where the testimony of the deceased party has been preserved and may be used in evidence, the surviving party is competent to testify as to the matters included in the testimony. (*Stone v. Hunt*, 114 Mo. 66, 21 S. W. 454; *Hayden v. Grillo*, 42 Mo. App. 1; *Leahy v. Rayburn*, 33 Mo. App. 55; *Coble v. McClin-tock*, 10 Ind. App. 562, 38 N. E. 74.) Where the personal representative introduced evidence of damaging admissions made out in the presence of the deceased by the surviving party to a transaction, the latter may disprove or explain them by his own testimony. (*Smith's Appeal*, 52 Mich. 415, 18 N. W. 195; *Donlevy v. Montgomery*, 66 Ill. 227; *Cousins v. Jackson*, 52 Ala. 262; *Merrill v. Penny*, 43 Vt. 605.) In *Penn v. Oglesby*, 89 Ill. 110, it was urged that the survivor was not competent to contradict or explain the admission given in evidence because it was made in the lifetime of the decedent, but the court said the objection was not tenable. To the same effect is *Burham v. Mitchell*, 34 Wis. 118.

The testimony which was offered by Phil. Harrington was not to the terms of any transaction held between Harrington and Leggat in the lifetime of Leggat, but it was as to the terms and circumstances of a transaction between Wearth and Harrington. The rule of exclusion of a witness never goes further, as we contend, than to debar them from testifying concerning transactions had between the dead man and the living witness.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is the third time this case has been before this court on appeal. (*Harrington v. Butte & Boston Min. Co.*, 19 Mont. 411, 48 Pac. 758; 27 Mont. 1, 69 Pac. 102.) The action is upon a check for \$2,500 issued by the Butte and Boston Mining Company to John A. Leggat, by Leggat indorsed generally and transferred to one Wearth, and by Wearth indorsed generally and transferred to this plaintiff, Harrington. The check was presented by Harrington to the First National Bank of Butte,

upon which institution it was drawn, payment refused, and this action resulted.

The defense pleaded is a want of consideration for the transfer of the check from Leggat to Wearth, and for the transfer from Wearth to Harrington. The cause was tried to the court sitting with a jury. A verdict for defendants was returned and judgment entered thereon, from which judgment and an order denying his motion for a new trial, the plaintiff appealed.

The record discloses that the check was received by Wearth from Leggat in settlement of a gambling debt, and that at the time he indorsed it Leggat was intoxicated, rendering his signature somewhat unnatural. Before the trial which resulted in the judgment from which this appeal is taken, Leggat died and his administrator was substituted.

Among others, the court gave to the jury instructions numbered 5 and 10, as follows: "No. 5. In this case you are further instructed that although you may believe from the evidence, that the plaintiff actually paid for the check as testified to, and that he had no knowledge of the fact that the check was obtained from Leggat by Wearth without any consideration, still if you find from the evidence that the facts and circumstances surrounding the purchase of the check by plaintiff from Wearth, if you find he did purchase it, would have put a reasonable prudent man upon inquiry, and if the plaintiff failed to make such inquiry, such failure is equivalent to actual notice and he cannot recover." "No. 10. If there is anything in a negotiable instrument to cast suspicion upon its character, the holder thereof, whether a holder for value, will be considered to have taken it under circumstances which render him guilty of bad faith, provided you may take into consideration all of the circumstances under which the plaintiff came into the possession of the check in question in determining whether or not he purchased it in good faith for value, and without notice of any fraud."

Upon the trial the plaintiff was introduced as a witness in his own behalf, and by him it was sought to show his transaction

with Wearth by which he came into possession of the check. Objection was made that the testimony was incompetent under the provisions of section 3162, Code of Civil Procedure, as amended by an Act of the Fifth Legislative Assembly, approved February 19, 1897 (Session Laws, 1897, page 245). This objection was sustained and exception taken. Later in the course of the trial it developed that at a former trial of this cause Leggat had testified that his testimony had been preserved, and upon this trial proof of the testimony which he had given upon such former trial was introduced on behalf of the defendants.

It is claimed that the trial court erred in excluding the testimony of the plaintiff, for the reason that Leggat's testimony, taken at a former trial, had been preserved. But it is sufficient to say that this fact did not appear to the trial court at the time Harrington was introduced as a witness, and that after it did appear, the plaintiff did not renew his offer; so that, if there is the exception to the rule as claimed by the appellant, he did not bring himself within it.

It is also said that the rule is not so extensive in its operations as to preclude the plaintiff from testifying to transactions had with a third person, even if the proof of such transactions tends to establish the plaintiff's claim against the estate of the deceased person. But in this, we think, counsel for appellant is in error. The language of section 3162 above, as amended, is: "The following persons cannot be witnesses: * * * 3. Parties or assignees of parties to an action or proceeding or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person."

The principal question is presented by a consideration of instructions Nos. 5 and 10 above. The doctrine announced in No. 5 is, that even though Harrington paid value for the check and had no actual knowledge of the fact that Wearth obtained it from Leggat without consideration, still, if the facts and circumstances attending the purchase of the check by Harrington

from Wearth were such as to put a reasonably prudent man upon inquiry, and if Harrington failed to make such inquiry, such failure on his part was equivalent to actual notice by him of the want of consideration for the transfer by Leggat to Wearth, and he could not recover. This never has been the law of this state and is not now, and, with the exception of a few states, it has not been the rule in this country for nearly three-quarters of a century. At an early date in the last century the rule announced in No. 5 above did prevail in England (*Gill v. Cubitt*, 3 Barn. & C. 466), and to some considerable extent in this country, but was repudiated by the English courts in 1836 (*Goodman v. Harvey*, 4 Adol. & E. 870), and by most of the courts of this country about the same time, and, with few exceptions, has not been given countenance by the courts of this country since. The overwhelming weight of authority is against it. But, in addition to this fact, that rule is entirely inconsistent with the provisions of our Civil Code upon the subject. When, in an action upon a negotiable bill or note, the defense of want of consideration in its making or transfer is interposed, it becomes a question whether the holder is an indorsee in due course, and, if he is, there are no defenses, except payment to him, which can be successfully maintained against his claim. (Civil Code, sec. 4035.)

Who, then, is an indorsee in due course? Section 4034 of the same Code answers this inquiry as follows: "An indorsee in due course is one who, in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer."

It appears from this record (first) that the check was indorsed by Wearth generally and transferred to Harrington; (second) that the instrument is a negotiable instrument; (third) that Harrington received it before its presumptive dishonor, and without knowledge of its actual dishonor; (fourth) that he received it in the ordinary course of business; and

(fifth), for the sake of this argument, we may say that Harrington paid value for it, although this is a disputed question of fact.

In order, then, for Harrington to put himself beyond the pale of the defense pleaded, as an indorsee in due course, it was only necessary for him to show good faith; so that, instead of suspicious circumstances sufficient to put a reasonably prudent man upon inquiry being the test of plaintiff's right to recover, the test provided by our Code is good faith. If the suspicious circumstances are of sufficient cogency, they may warrant the conclusion of the jury that the holder acted in bad faith in procuring the paper; but the test, nevertheless, is good faith. If Harrington acted in good faith in his transaction with Wearth—assuming the other five premises announced above—then the defense interposed is not available against him.

The rule is thus stated in 7 Cyc. 944: "The principle is now well established that neither a suspicion of defect of title, knowledge of circumstances which would excite such suspicion in the mind of a prudent man or put him on inquiry, nor even gross negligence on the part of the taker will affect his right unless the circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith. In other words, the question is now one of good or bad faith, and not of diligence or negligence, except so far as the want of caution is material as bearing on the question of good faith, and suspicions or knowledge of facts which fall short of bad faith do not amount to notice." The authorities cited in support of the text are far too numerous to be reproduced here. The same doctrine is announced and authorities at great length cited, in 1 Daniel on Negotiable Instruments, fifth edition, sections 770-775.

It has been well said by the supreme court of Texas: "The ordinary rule of constructive notice which applies to the purchaser of property is not applicable in the case of negotiable instruments. As promotive of their circulation, a liberal view is taken, which makes the *bona fides* of the transaction the de-

cisive test of the holder's right. He is entitled to recover upon it if he has come by it honestly." (*Wilson et al. v. Denton et al.*, 82 Tex. 531, 27 Am. St. Rep. 908, 18 S. W. 620.)

Instruction No. 10 above is erroneous, for two reasons: First, it is a flagrant invasion of the province of the jury for the court to say that particular evidence proves a particular fact, as this instruction does; second, it is wrong in saying that suspicious circumstances alone will defeat recovery. The last half of the instruction, if standing alone, would correctly state the law; but, taken in connection with the first portion, the jury could draw but one conclusion, namely: if there were any suspicious circumstances attending the purchase of the check by Harrington, he was guilty of bad faith, and, as a result, could not recover. While evidence of suspicious circumstances or gross negligence on the part of Harrington—if any there was—was admissible upon the question of his good or bad faith, it remains for the jury to say whether such evidence in fact proves bad faith.

As this case must go back for a new trial, attention is directed to instruction No. 3 as given, which also submits to the jury the same erroneous theory of the law as instruction No. 5, but is further defective in submitting to the jury certain premises, but failing to inform the jury what conclusions might properly be drawn from the premises announced.

Because of these errors, the judgment and the order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. JUSTICE MILBURN concurs.

MR. CHIEF JUSTICE BRANTLY, being disqualified, takes no part in the foregoing decision.

33	238
34	318

33	338
38	240

33	338
40	134
40	252

**POINDEXTER & ORR LIVE STOCK COMPANY, RESPOND-
ENT, v. OREGON SHORT LINE RAILROAD COM-
PANY, APPELLANT.**

(No. 2,082.)

(Submitted December 2, 1905. Decided December 18, 1905.)

***Railroads—Killing Live Stock—Evidence—Motion to Strike—
Variance—Instructions.***

Railroads—Killing Live Stock—Evidence—Res Gestae.

1. In an action against a railroad company for the killing of live stock, brought under section 951 of the Civil Code, the testimony of a witness that the section boss showed him where the animal was when struck, and stated that after it was struck he killed it to end its sufferings, was not admissible as *res gestae*.

Railroads—Killing Live Stock—Evidence—Motion to Strike.

2. Where, in an action against a railroad company for the killing of live stock, a witness was permitted, without objection, to testify to certain declarations of a section boss who witnessed the accident, and counsel for defendant thereupon cross-examined the witness, notwithstanding the evidence was clearly hearsay, and then for the first time moved to have it stricken out, the effort to exclude it came too late, and the district court properly denied the motion.

Railroads—Killing of Live Stock—Pleadings—Proof.

3. *Held*, in an action against a railroad company to recover for the killing of live stock, under Civil Code, section 951, that proof of an injury to an animal which would inevitably result in its death, substantially supports an allegation of killing.

Railroads—Killing of Live Stock—Complaint—Proof—Variance.

4. The complaint in an action against a railroad company to recover for cattle killed by it, under section 951 of the Civil Code, alleged that the company so negligently managed its locomotive and cars as to kill the animal in question. The proof showed that while the animal had been fatally injured, it was actually killed by a section boss in defendant's employ, to end its sufferings. *Held*, that the defendant not having been misled by the variance, and substantial justice having been done between the parties (Code of Civil Proc., secs. 770, 778), the judgment will not be reversed because of the variance.

Railroads—Killing of Live Stock—Negligence—Instructions.

5. An instruction given in an action, brought under section 951 of the Civil Code, against a railroad company, for the killing of live stock, to the effect that the law presumed such killing to have been the result of defendant's negligence, correctly stated the law, even though it appeared that while the animal was fatally injured by the locomotive and cars of the defendant, the actual killing was done by one of defendant's employees to end its sufferings. [MR. JUSTICE MILBURN dissenting.]

Appeal from District Court, Beaverhead County; M. H. Parker, Judge.

ACTION by the Poindexter & Orr Live Stock Company against the Oregon Short Line Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Mr. John G. Willis, for Appellant.

Mr. H. E. Melton, and *Mr. J. B. Poindexter*, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought under section 951 of the Civil Code, to obtain a judgment for the value of a bull, for that the defendant corporation, operating a railroad within the state of Montana, so negligently managed its locomotive and cars that the same ran against and over said bull and killed and destroyed the same, to the damage of plaintiff in the sum of \$100. The statute provides: "Sec. 951. Every railroad corporation or company operating any railroad, or branch thereof, within the limits of this state, which shall negligently injure or kill any horse, mare, * * * bull * * * , or any other domestic animal, by running any engine or engines, car or cars, over or against any such animal, shall be liable to the owner of such animal for the damages sustained by such owner by reason thereof * * * ." It further provides that proof of the injury or killing shall be *prima facie* proof of negligence.

At the close of plaintiff's case the defendant moved for a nonsuit on the grounds, (1) that the complaint does not state a cause of action; and (2) that the evidence does not show that the defendant, or any of its servants or employees, did injure or kill the animal in question. The motion being denied, and defendant declining to offer any evidence, the cause was submitted to the jury, which found a verdict for plaintiff. Judgment was entered accordingly. The defendant has appealed from the judgment. Its validity is assailed on three grounds: (1) That the court erred to defendant's prejudice in refusing to strike out certain evidence; (2) in overruling the motion for

nonsuit; and (3) in submitting to the jury a certain instruction.

1. One Sprinkle was called as a witness. He stated, among other things, that shortly after the accident he came to the place where it occurred and found there the section crew; that he saw the animal and knew it to be the property of the plaintiff; that the section boss pointed out to him the place where it was when struck by the train, and told him that after the animal had been struck, he, the section boss, had "knocked him in the head." From other testimony it appears that the animal's back was injured, and that the section crew, being of the opinion that it would die in any event, killed it to end its sufferings. This evidence was admitted without objection, and the witness was fully cross-examined. Thereupon a motion was made to strike out the evidence in so far as it detailed the statements made by the section boss, on the ground that it was hearsay and incompetent.

This evidence was clearly incompetent upon any theory. The declarations of the section boss were not a part of the *res gestae*. They were not admissible as such under the statute (Code of Civil Procedure, section 3126), for they were not concurrent with the main transaction—the accident—nor did they spring from it as spontaneous, voluntary statements induced by it and explanatory of it. While the declarations or admissions of an agent are admissible, as against his principal, when made within the scope of his authority and accompanying the act upon which it is sought to charge his principal, after a transaction has been closed, his subsequent declarations are narrative of a past transaction, and are mere hearsay. (*Ryan v. Gilmer*, 2 Mont. 517, 25 Am. Rep. 744; *Hogan v. Kelly et al.*, 29 Mont. 485, 75 Pac. 81; *Durkee v. Central Pac. Ry. Co.*, 69 Cal. 533, 58 Am. Rep. 562, 11 Pac. 130.)

The declarations under consideration do not even have the merit of being those of an agent who had control or management of the train. So far as the relation of the second boss to the matter of the running of the train was concerned, he stood as a stranger to the accident in question. The running of trains

was a matter entirely beyond the scope of his authority. Upon no theory, then, could his declarations be treated in any other light than that of a stranger who witnessed the accident.

But, though this is true, it does not follow that the court erred in refusing to strike out the evidence. Counsel sat by and permitted the evidence to be heard without objection. He cross-examined the witness, though it was apparent from the beginning that his testimony was hearsay. It was also apparent for what purpose it was introduced. Then, for the first time, he endeavored to have it excluded. Had objection been made to its introduction, the court would doubtless have excluded it. As it was, the effort to have it excluded came too late. "The practice, whether in civil or criminal cases, of deliberately permitting evidence to be given without objection in the first instance, and then moving to strike it out on grounds which might readily have been availed of to exclude it when offered, is not to be tolerated." (*People v. Long*, 43 Cal. 444. See, also, *People v. Samario*, 84 Cal. 484, 24 Pac. 283; *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006; *Wheelock v. Godfrey*, 100 Cal. 578, 35 Pac. 317.)

Complaint is made that a like error was committed by the court in refusing to strike out testimony of Walter Poindexter to the same or similar declarations of the section boss. The record does not show that any such motion was made.

2. Contention is also made that the complaint does not state a cause of action under the statute. In this contention we think counsel is in error. It states a cause of action under the statute for the negligent killing of an animal. The contention is made, however, that since the allegation of the complaint is, that the defendant killed and destroyed the animal in question, and the evidence tends to show that it was only injured, but that it was killed by the section boss to end its suffering, the court in not sustaining the motion for nonsuit committed error. Contention is also made that the evidence does not show that the injury was done by the engine or cars of the defendant.

It is true that there is a variance between the proof and the allegation in the pleading; but it is manifest that the injury

to the animal was fatal, and that for all practical purposes it was killed. In other words, the proof tends to establish the fact that the killing by the section boss merely hastened what would inevitably have been the ultimate consequence of the injury. Section 770 of the Code of Civil Procedure provides: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been misled, the court may order the pleadings to be amended, upon such terms as may be just." Evidently, the defendant was not misled by this variance. Substantial justice was done between the parties, and, in view of the further provision of that Code (section 778), "that the court must, at every stage of an action, disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect," we do not think the judgment should be reversed. The pleadings and proof must correspond; but in view of the provisions of the statute, *supra*, it would seem an exceedingly technical application of this rule to reverse the judgment because of this variance.

Proof of an injury which would inevitably result in death to the animal injured substantially supports an allegation of killing. Though the evidence is not strong—that tending directly to show that the animal was killed by being struck by a train being in part hearsay—yet, assuming, as we have done, that the hearsay portion of it is properly in the case, and that it tends to support the theory that the killing was done by the train and not by other means, it, with this evidence, was sufficient to go to the jury, and the finding of the jury thereon may not be disturbed.

3. The court instructed the jury, in substance, that if the bull was killed in the manner and form alleged in the complaint, the law presumed such killing to have been the result of defendant's negligence. This instruction declares the statutory rule

(Civil Code, section 951). It is argued that, since the proof shows that the killing was actually done by the section boss, the instruction is not applicable to the facts. In view of what has already been said touching the probative effect of the evidence under the allegations of the complaint, it is apparent that this contention must be held to be without merit.

The judgment is affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE MILBURN: I dissent. The statute under which this action is brought is special, and a complaint drawn under it must be strictly within its provisions if the plaintiff desires to avail himself of its special benefits. Where words peculiar and essential are used in the statute, the same or words of the same signification must be employed in the pleading. Ordinarily, in a damage suit where negligence must be proven affirmatively, it must be expressly alleged; but in cases under this statute, when an animal is injured or killed because of violent contact with cars or engines, the legislature, with special regard for owners of the animals who cannot expect to find witnesses who saw the accident and who actually know under what circumstances the animal was killed, has provided that negligence will be presumed from the injury or killing by such contact. It was perhaps unnecessary for the legislature to use both words "injure" and "kill," as the word "injure" would have been sufficient to include both ideas; but it has used both words.

The complaint alleges that the animal was "killed and destroyed." The word "destroyed" apparently is another way of trying to say "killed"—that is, it is used tautologically. The animal might be injured and not destroyed, but it could not be killed without being destroyed. The evidence tends to show that the bull was seriously injured, probably fatally; but this is not alleged in the complaint. It was not killed by the railroad. It was killed by a man with a sledge hammer. Killing with a sledge hammer is not killing by contact with railroad rolling stock. The company is not responsible for the acts of the slayer

in the premises; and if it were, this action would not lie under the peculiar statute under such circumstances, because the animal was not killed by contact with the rolling stock. A suit of a different character might be brought and maintained. The plaintiff could have amended its complaint in the court below to comport with the evidence. It did not offer to amend. There was not any suggestion of an amendment. Plaintiff does not appear in this court by brief or otherwise, and I do not think that this court ought of its own motion to violate the rules of the English language for plaintiff's benefit.

In some states in case of railroad accidents, where some people are killed and others seriously injured, it is provided by law that in case of the killing of a passenger the company may not be mulcted in damages in a sum exceeding \$5,000, leaving it to the court and jury, in suits for damages for injuries not resulting in death, to assess against the company such compensatory and punitive damages as in reason and law should be found, in sums often exceeding \$5,000. If a passenger receive injuries which in all probability would soon result in his death, and some person should shoot him dead in order to put him out of his misery, would any court for one moment listen to the plea of the railroad company that it had killed the passenger and, therefore, ought not to be mulcted in a sum exceeding \$5,000, if sued for damages for the injury, the patient lingering some weeks before his tragic killing by a stranger? I think not.

I do not think that the statutes referred to in the opinion of the majority of the court were intended by the legislature to be invoked by us to cure in this court mistakes, errors and omissions which the plaintiff, upon simple suggestion to the court below, could have cured by inserting in his pleading words telling what was meant to be alleged. I think the holding in the majority opinion is a bad precedent, to be followed, possibly, in cases of much more importance. We should, in my opinion, decide this case upon the record as made by plaintiff below, and not upon what it should have been, but was not.

Rehearing denied January 20, 1906.

STATE **EX REL.** ROCKY MOUNTAIN BELL TELEPHONE
COMPANY, RESPONDENT, v. MAYOR ETC. OF THE
CITY OF RED LODGE, APPELLANTS.

(No. 2,186.)

(Submitted December 1, 1905. Decided December 18, 1905.)

*Telephone Companies—Municipal Corporations—Use of Streets
—Mandamus.*

1. A telephone company, having the absolute right to use the streets of a city for the erection of its poles and construction of its lines, subject only to such reasonable regulations by the city as to *where in the streets* the poles and other appliances should be placed, cannot compel the city by *mandamus* to designate the streets, avenues and alleys upon which to place its necessary appliances.

Appeal from District Court, Carbon County; Frank Henry, Judge.

Mandamus by the state, on the relation of the Rocky Mountain Bell Telephone Company, against the mayor and city council of the city of Red Lodge. From a judgment directing a peremptory writ of mandate to issue, the respondents in the district court appeal. Reversed with directions to dismiss proceedings.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is a proceeding in *mandamus* by the state, on the relation of the Rocky Mountain Bell Telephone Company against the mayor and the city council of Red Lodge and the city of Red Lodge. After the formal allegations, the petition sets forth that the relator is desirous of installing a local telephone exchange in Red Lodge, and, in order to do so, it is necessary for the company to erect its poles and construct its lines along all the streets, alleys and avenues of the city which have not already been designated; that it made demand upon the respondents that they make a designation of all such streets, avenues and

alleys in said city, upon which streets, avenues and alleys the company may erect its necessary poles, fixtures, etc.; and that this demand was refused. The prayer of the petition is, that an alternative writ of mandate issue, directed to the respondents, commanding them to make a further designation of all the other streets, avenues and alleys in the city of Red Lodge not already designated, upon which streets, avenues and alleys the company may erect its necessary poles and fixtures for the proper construction and maintenance of its telephone lines and local exchange, etc. Upon this verified petition an alternative writ of mandate was issued, together with an order to show cause. The alternative writ followed the language of the prayer of the petition as set forth above.

The respondents answered and attempted to show cause why a peremptory writ should not issue. Thereupon the relator moved for judgment on the pleadings, which was sustained and a judgment for relator entered directing the peremptory writ of mandate to issue in terms substantially similar to the commanding portion of the alternative writ mentioned above, and for relator's costs. From this judgment the respondents in the trial court appealed.

Certain specifications of error are made by appellants in their brief, but, under our view of the case, these need not be considered.

Section 1961 of the Code of Civil Procedure provides that the writ of mandate "may be issued by the supreme court or the district court, or any judge of the district court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station."

What were the respondents in the trial court (appellants here) asked to do? To designate all streets, avenues and alleys in the city of Red Lodge which had not been designated for the company's long distance system, upon which streets, avenues and alleys the company might erect its poles and construct its

lines for a local exchange. Is this a duty enjoined upon a city or upon its mayor or council?

In *State ex rel. Rocky Mountain Bell Tel. Co. v. Mayor etc. of Red Lodge*, 30 Mont. 338, 76 Pac. 758, an application was made for a writ of mandate to compel the city council of Red Lodge to designate where, in the streets, avenues and alleys, the telephone company might place its poles, lines, etc., for the purpose of conducting a long distance telephone business, and upon appeal this court held that the company had the absolute right to use the streets, avenues and alleys for the purpose of conducting such business, subject, however, to the right of the city to make reasonable regulations as to where in the streets the posts, piers and abutments should be placed, the height of the poles to be used, etc. If the company has the right to conduct its business and to use all the streets, alleys and avenues, what is its purpose in asking the city to designate such streets, alleys and avenues? The term "designate" is defined as follows: "To mark out and make known; to point out, to name; to indicate; to show; to distinguish by mark or description; to specify; to call by a distinctive title; to indicate or set apart for a purpose or duty." (Webster's International Dictionary.)

Now, what would this company have the city of Red Lodge do? Name its streets? Point out their boundaries? Or furnish an officer to show the agents of the company where a particular street or alley is located? Or would it have the city give it permission to do business? However convenient it might be to have these things done, the city does not owe this company the duty of doing any of them. As said in the *Red Lodge Case* above: It is the duty of the city to designate the places in the streets, alleys and avenues where the poles, abutments, etc., are to be placed. But the city was not asked to do this, and it is not sought to compel it to do it in this proceeding. If the company asked for what it wanted, it is not entitled to the relief sought and does not need it. If it meant to ask that the city be compelled to designate places in the streets for its poles, etc., as it did in the *Red Lodge Case* above, it failed to express its mean-

ing; and, as it did not ask for the relief to which it might have been entitled, the trial court was not justified in granting relief to which it was not entitled. Had the company asked the city to designate places in the streets, alleys and avenues where its poles, abutments, etc., might be placed, we must presume that the city would have complied. But the city cannot be coerced into doing an idle thing; for had it fully complied with the demand pleaded in the petition, the telephone company would have been no better off than before.

While the particular point upon which we have decided this appeal is not urged in appellants' brief, still this court will not give sanction to a judgment which it would not enforce in contempt proceedings—if such should arise by reason of the failure of appellants to comply with the judgment—and will not consent that the writ of mandate may be made use of for a purpose for which it was not intended, or wherein its use would be vain.

The facts set forth in the petition do not entitle the relator to any relief. The judgment is reversed and the cause remanded to the district court with directions to dismiss the proceedings.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

LOVE, APPELLANT, v. FLAHIVE ET AL., RESPONDENTS.

(No. 2,194.)

(Submitted December 1, 1905. Decided December 18, 1905.)

Public Lands—Land Department—Findings of Officers—Conclusiveness—Homesteads—Application.

Land Department—Findings of Officers—Conclusiveness.

1. In the absence of fraud, a finding of the officers of the Land Department, to the effect that two applications to make entry of the same parcel of public land were tendered simultaneously, is conclusive upon the courts.

Public Lands—Homestead Applications—Simultaneous Filing.

2. Where two applications for homestead entry on the same land were filed simultaneously, after the expiration of three months from the date the official plat was approved and filed in the local land office, a finding of the Secretary of the Interior that the applicant who had preserved his right to the land intact since his settlement should be given preference over the other, who had relinquished or abandoned his right, in the absence of evidence that the latter's right had been re-established prior to the date of settlement by the former applicant, was proper.

Public Lands—Homestead Applications—Questions of Fact—Land Department.

3. As between two simultaneous applications for entry of homestead land, the question as to which of the applicants had made the prior settlement was a question of fact for the determination of the Land Department.

Appeal from District Court, Missoula County; F. C. Webster, Judge.

ACTION by Edward H. Love against Annie Flahive and Andrew J. Lansing. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Messrs. Toole & Bach, and Mr. Charles E. Pew, for Appellant.

A mistake or error of the Land Department in construing the law on account of which the lands of one are given to another entitles the real owner to a decree in equity, treating such other as a trustee, and requiring him to convey to the true owner. (*Starks v. Starrs*, 6 Wall. 402, 18 L. Ed. 925; *Lylle v. Arkansas*, 22 How. 193, 16 L. Ed. 306; *Garland v. Winn*, 20 How. 8, 15 L. Ed. 243; *Lindsey v. Hawkes*, 2 Black, 554, 17 L. Ed. 265; *State v. Strauter*, 21 Land Dec. 453; and especially *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485.) Under the statute all of Flahive's rights were forfeited, and he was in no situation to reassert them to the premises actually enclosed and possessed by plaintiff, and if he was, he is charged with doing so *before* plaintiff, and a simultaneous application would be entirely insufficient. (*Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485.) If both parties were guilty of laches, the failure of Flahive to file on the eleventh day of March made plaintiff

in possession prior settler, and required Flahive to file, not *simultaneously*, but *first* to defeat it. It seems that under such circumstances the filing of Flahive on the 14th of June simultaneously with plaintiff was void. Whatever possession and *right of possession* he had on the tenth day of March were extinguished by the actual occupancy and claim of plaintiff at that time. Two things were necessary, then, to take this right from him: First, a forfeiture, and second a prior filing thereafter. Here there was a forfeiture but no prior filing. This under the law does not extinguish the rights acquired by the claim and possession of plaintiff, after forfeiture by defendant Flahive. (*Turner v. Sawyer*, 150 U. S. 587, 14 Sup. Ct. 192, 37 L. Ed. 1191. See, also, *Hosmer v. Wallace*, 97 U. S. 575, 24 L. Ed. 1130.) The second application of Love did not necessarily operate as an abandonment of his first application of April 5th. All that can be said is that if the law required a new filing, it was made; if it did not, he could rely upon his former filing after the forfeiture by Flahive. (*Motherway v. Parks*, 13 Land Dec. 56; *Perrott v. Connick*, 13 Land Dec. 598.) The complaint alleges the delivery of the application to enter, the possession of it for that purpose, the erroneous rejection on the fifth day of April, its reversal on appeal, and assigns as fatal error the failure to so treat it as filed, instead of the date upon which the entry was made. Under these conditions the officers of the Land Department committed an error by not treating it filed as of that date, on account of which the patent which should have gone to plaintiff was awarded to defendant Flahive. This error, we insist, is absolutely conclusive of the questions involved in favor of the plaintiff, under the following authorities: *Duluth etc. Ry. Co. v. Roy*, 173 U. S. 590, 19 Sup. Ct. 549, 43 L. Ed. 822; *Lytle v. Arkansas*, 9 How. 314, 13 L. Ed. 153; *Ard v. Brandon*, 156 U. S. 537, 15 Sup. Ct. 406, 39 L. Ed. 524; *Shepley v. Cowan*, 91 U. S. 330, 23 L. Ed. 424; *Motherway v. Parks*, 13 Land Dec. 56; *Perrott v. Connick*, 13 Land Dec. 598; *Roy v. Duluth etc. Ry. Co.*, 69 Minn. 522, 72 N. W. 794; *Hosmer v. Wallace*, 97 U. S. 575, 24 L. Ed. 1130; *Bohall v.*

Dilla, 114 U. S. 47, 5 Sup. Ct. 782, 29 L. Ed. 61; *Atherton v. Flower*, 96 U. S. 513, 24 L. Ed. 732.

Messrs. Woody & Woody, and *Mr. Elmer E. Hershey*, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to obtain a decree declaring the defendant, Annie Flahive, trustee for the benefit of the plaintiff of the legal title to the east half of the southeast quarter of section 22, township 20, north of range 26 west, in Missoula county. The defendant Lansing is made a party because he appears of record as a holder of a mortgage upon the property from his codefendant. The debt secured by this mortgage is alleged to have been paid, except a small balance. The district court sustained a general demurrer to the complaint, and, plaintiff declining to amend, entered judgment for the defendants. Plaintiff has appealed from the judgment.

The complaint is prolix and contains much matter that is immaterial. The pertinent facts, as they appear from its allegations and the exhibits attached to and made a part of it, are substantially as follows: In May, 1882, the plaintiff, being a citizen of the United States and qualified to acquire a homestead upon the public domain under the federal homestead laws, settled upon the east half of the northeast quarter of section 27, township 20, north of range 26 west, and built a house thereon. He claimed this land and also the land in controversy immediately to the north. He fenced it all except the north twenty acres of the disputed portion. One Michael Flahive, the husband of the defendant, Annie Flahive, then worked for him and built the fence. The land had not been surveyed. In October, 1884, Michael Flahive made settlement on the northwest quarter of the southeast quarter of section 22. He built a house thereon, and thereafter claimed the whole of that quarter of the section as his homestead. He was also qualified to acquire a

homestead under the laws of the United States. He retained possession of the west half of the quarter section and also of the unfenced portion of the east half and cultivated it.

The official survey was made in 1886, but the plat was not approved and filed in the local land office until December 11, 1888. On January 2, 1889, the plaintiff executed the papers necessary to enter the land claimed by him. On January 16th Flahive executed the papers necessary to enter the southeast quarter of section 22. It does not appear distinctly from the allegations of the complaint when the applications were tendered to the officers of the local land office. However the fact may have been, in the subsequent controversy between the parties as to which of them was entitled to enter the land in dispute, these officers found and declared that the entries were tendered simultaneously, and by a decision made on August 20, 1890, fixed the date as June 14, 1889, and, inasmuch as the plaintiff appeared to have been the first settler, recognized his claim, permitted him to make the entry, and rejected Flahive's application as to the disputed portion. This decision was, upon successive appeals to the commissioner of the general land office and the Secretary of the Interior, affirmed, the decision of the Secretary of the Interior being rendered on January 12, 1894.

In the meantime Flahive died. The defendant, Annie Flahive, his widow, thereupon filed a motion for a rehearing, the ground alleged being that subsequent to his settlement in 1882, the plaintiff had, by a sale, parted with his interest in the portion of section 22 in controversy to one Rundall, who in turn had sold to Flahive, with the result that the plaintiff's right to entry was subject to that of her husband Flahive. The rehearing was granted and the matter referred to the local officers for proof. Again the decision of these officers was in plaintiff's favor. Upon final appeal to the Secretary of the Interior this decision was reversed and the rights of the defendant Flahive held superior to those of the plaintiff. This decision was rendered on December 26, 1896. A motion for rehearing by the plaintiff, on the ground that the records of the local land office showed that

his application for entry was in fact made prior to that of Flahive, and as early as April 5, 1889, was denied on March 15, 1897. Thereupon Flahive's entry was allowed and patent issued to Annie Flahive.

In making the decision of December 26, 1896, the Secretary of the Interior had before him evidence from which he found that subsequent to the date of plaintiff's entry in 1882, he had sold his interest, whatever it was, in the land in dispute to one Rundall, who in turn sold it to Flahive, and held that, such being the case and the two entries having been tendered simultaneously, the Flahive application should be given preference.

By the motion for rehearing by plaintiff, there was submitted the question whether, upon the records, the application for entry by the plaintiff had not in fact been made prior to June 14, 1889, and as early as April 5, 1889. It does not appear from the allegations of the complaint that such was the case; nor that the finding by the officers of the local land office that the entries were tendered simultaneously was erroneous. The decision of the Secretary of the Interior held in effect that, since the entries were tendered simultaneously, it was of no consequence whether June 14th or April 5th was the correct date, that the result of the sale by the plaintiff was the same in either event, and that it operated as an estoppel against plaintiff's claims to preference.

The contention is made that the officers of the Land Department erred in holding that the fact that plaintiff's application for entry was tendered to the officers of the local land office as early as April 5, 1889, was immaterial, since, if the application was in fact made at that time, he, being the first settler, had the preference. The further contention is made that if the applications were tendered simultaneously on June 14, 1889, the plaintiff was entitled to the preference, because, Flahive having failed to avail himself of his preferential right during the three months following the approval of the survey and the receipt of the plat at the local land office (U. S. Rev. Stats. 2266; 21 Statutes at Large, p. 140, secs. 2, 3), the right

of plaintiff under his prior settlement became again superior, even if it be conceded he had lost it in the first instance by sale to Rundall subsequent to such settlement. In other words, let it be conceded that the sale operated as an estoppel to his assertion of a claim to preferential entry until the expiration of the time during which Flahive had the exclusive right—that is, until the expiration of the three months after the receipt of the plat at the local land office—the plaintiff's old right revived and he should have been given preference, though the applications for entry were tendered simultaneously. It is said that in deciding both matters there was error in the application of the law to the facts, and plaintiff invokes the rule that whenever the officers of the Land Department of the United States have misconstrued the law involving the rights of entrymen, or have made a misapplication of it to the facts of the particular case, with the result that a patent has been issued to the wrong person, and thus an injustice is done to another who is of right entitled to it, a court of equity will hold the former a trustee for the latter and decree title accordingly. This rule is well settled. (*Small v. Rakestraw*, 28 Mont. 413, 104 Am. St. Rep. 691, 72 Pac. 746; *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485.) But we think it has no application to this case.

In holding that it was not material whether the plaintiff's application to make entry was in fact tendered on April 5 or June 14, 1889, the Secretary's decision was clearly right. By the decision of August 20, 1890, it was found by the local officers that the entries were tendered simultaneously. So far as the record shows, this finding was never questioned. Nor was the date of filing ever questioned until, by the motion for a rehearing, decided by the Secretary on March 15, 1899, the Secretary held that even if the local officers were mistaken in fixing June 14th as the date, the fact of simultaneous application still remained unquestioned, and that the difference in the date did not avail. If it be assumed that the finding of the local officers was erroneous as not being in accordance with the preponderance of the evidence, or that the decision of the Secretary was

wrong for the same reason, yet what the evidence before them was does not appear; and if it did, this court could not assume to review it and reach a different conclusion; for, in the absence of fraud, the findings of the officers of the Land Department upon all questions of fact are conclusive upon the courts. (*Small v. Rakéstraw, supra*, and cases cited.)

Again, it is manifest that if the plaintiff after his settlement had sold his interest to Flahive, the latter had the exclusive right of entry until March 11, 1889. As between the two applications tendered before that date, Flahive was entitled to preference. If plaintiff's right had been sold or abandoned by him, it must follow that his settlement in 1882 could not be recognized as initiating any right of preference over Flahive, who had preserved his from the date of settlement in 1884. After the expiration of the three months from December 11, 1888, the parties stood upon equal footing, and the one first tendering his application was entitled to preference. Since they were tendered simultaneously and both parties founded their claim of right upon their first settlement, the Secretary of the Interior concluded that the Flahive right, which had been preserved intact, should be given preference over one which had been relinquished or abandoned, nothing appearing to show that the latter had ever been re-established prior to the date of Flahive's settlement. After a claim has once been abandoned, the right to it may be acquired by any other person who desires to take it.

Counsel for appellant have devoted much of their argument to the contention that the Secretary in his decision of December 26, 1896, holding that the plaintiff was estopped by his sale to Rundall to claim a preference right, undertook to adjudicate the equities between the parties, whereas all these matters should have been left to be determined by a court of equity having cognizance of such matters. It is of no consequence whether the result of the sale be called an estoppel or an abandonment. The fact that there was a sale made was material in an investigation of the questions then before the Sec-

retary and entirely within his jurisdiction to decide, to-wit: who made the prior settlement and was therefore entitled to entry? This being a question of fact, it was within the jurisdiction of the Department to decide it, and in the absence of fraud, its finding must be deemed conclusive. (*Small v. Rakestraw*, *supra*, and cases cited.)

The judgment of the district court was correct and must be affirmed.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

Rehearing denied January 20, 1906.

Appeal taken to supreme court of United States.

STATE EX REL. LOTT, RELATOR, v. DISTRICT COURT ET AL., RESPONDENTS.

(No. 2,255.)

(Submitted December 16, 1905. Decided January 3, 1906.)

Mandamus—Justices of the Peace—Ejectment—Unlawful Detainer—Jurisdiction—Certifying Case to District Court.

Justices of the Peace—Ejectment—Jurisdiction—Certifying Case to District Court—*Mandamus*.

1. A complaint filed in a justice of the peace court, if stating a cause of action in ejectment, does not give the justice jurisdiction for any purpose, so that he cannot confer jurisdiction on the district court by certifying the case to it; and the latter court cannot be compelled by *mandamus* to hear and determine it.

Same—Unlawful Detainer—Certifying Case to District Court—*Mandamus*.

2. If the question of title to real estate may be raised in an action in unlawful detainer, a justice of the peace cannot certify the cause to the district court without the bond required by Code of Civil Procedure, section 1486, having been filed, and where no such bond was furnished, the district court cannot be compelled by *mandamus* to hear and determine the cause.

Same—Unlawful Detainer—Certifying Case to District Court—*Mandamus*.

3. If the question of title may not be raised in an action in unlawful detainer, all allegations respecting it in the pleadings are sur-

plusage, and the justice of the peace court has jurisdiction to hear the cause, of which jurisdiction it cannot divest itself by certifying the cause to the district court (Code of Civil Procedure, section 1486); and *mandamus* will not lie to compel the latter court to hear and determine the case so certified to it.

ORIGINAL application for writ of *mandamus* by the state, on the relation of M. H. Lott, against the district court of the fifth judicial district, in and for the county of Madison, and Lew. L. Callaway, judge thereof. Proceedings dismissed.

Mr. E. B. Howell, and *Mr. Geo. R. Allen*, for Relator.

Mr. M. M. Duncan, and *Mr. W. A. Clark*, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On July 21, 1905, an action was commenced in a justice of the peace court of Madison county by this relator against Mrs. D. A. Pease and another. The complaint alleges that at all times therein mentioned the plaintiff was the owner in fee simple of certain real estate, which is particularly described; that in November, 1903, plaintiff let the premises to D. A. Pease under a tenancy at will; that D. A. Pease afterward died and defendants are his sole heirs; that D. A. Pease and, after his death, the defendants, continued to occupy the premises under said tenancy; that on June 16, 1905, plaintiff terminated such tenancy by giving the notice required by law, and demanded that defendants vacate and surrender the premises; but this the defendants have failed and refused to do, to plaintiff's damage in the sum of \$200. The prayer is for the restitution of the property and for \$200 damages, which it is asked to have trebled in the judgment.

The defendants by answer deny that the relation of landlord and tenant ever existed between plaintiff and defendants; deny that plaintiff has any title or right of possession to the property; plead the bar of the statute of limitations; set up affirmatively title in themselves to the land in controversy; and ask that the cause be certified to the district court, as the de-

termination of the title to real estate is necessarily involved. There was not any bond given as required by section 1486 of the Code of Civil Procedure.

A change of venue was taken to another justice of the peace court, and by agreement of the parties, the cause was certified to the district court, where the plaintiff paid the filing fee and moved the district court to strike out the defendants' answer, and for judgment. This motion was overruled, and the district court thereupon declined to proceed further with the case and remanded it to the justice of the peace court, there to be proceeded with according to law. The relator thereupon made application to this court for a writ of mandate to compel the district court to set aside its order and proceed to hear and determine the case. An alternative writ with an order to show cause was issued, and upon return the respondent court and judge moved to quash the alternative writ and to annul the order to show cause.

Numerous questions were suggested upon oral argument and are presented in the briefs of respective counsel, which need not be considered; for, upon any theory of the case presented, *mandamus* will not lie.

1. If the complaint filed in the justice of the peace court be considered as stating a cause of action in ejectment, as held by the court of appeal of California in *Hayden v. Collins*, 1 Cal. App. 259, 81 Pac. 1120, then the justice of the peace court never acquired jurisdiction for any purpose, and could not confer jurisdiction upon the district court by certifying the case to that court.

2. Assuming that the complaint states a cause of action in unlawful detainer, then, (a) if the question of title to real estate may be raised in such an action, it is sufficient to say that the bond, required by section 1486 of the Code of Civil Procedure, was not given, and without it the justice of the peace could not certify the case to the district court (12 Ency. of Pl. & Pr. 687, and cases cited); or, (b) if the question of title to real estate may not be raised in an action in unlawful detainer,

then all these allegations respecting title, as set forth in the complaint and answer, are surplusage and the action is simply one in unlawful detainer, of which the justice of the peace court had jurisdiction, and, having jurisdiction, could not divest itself thereof by certifying the case to the district court; for the only provision of law authorizing a case to be certified to the district court is section 1486 above, and that refers only to a case where the title to real estate may properly be put in issue by the answer. In any view of the case, the district court did not owe any duty to hear or determine this case and cannot be coerced by *mandamus*.

The order to show cause is annulled, the alternative writ is quashed, and the proceedings are dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

STATE EX REL. BRUCE, RELATOR, v. DISTRICT COURT ET
AL., RESPONDENTS.

(No. 2,256.)

(Submitted December 21, 1905. Decided January 3, 1906.)

Contempt—Interference with Judicial Proceedings—Jurisdiction—Order to Show Cause—Sufficiency.

Contempt—Interference with Judicial Proceedings—Resisting Officer.

1. Resistance of, or interference with, an officer while endeavoring to take property into his possession pursuant to the provisions of Code of Civil Procedure, section 843, in an action in claim and delivery, is an interference with the proceedings of the court in the cause, and constitutes a contempt within the meaning of Code of Civil Procedure, section 2170, subdivision 9.

Contempt—Jurisdiction—Refusal to Receive Summons.

2. The district court may punish a defendant in an action in claim and delivery for contempt (Code of Civil Procedure, section 2170), notwithstanding, technically, it had not acquired jurisdiction over him, by reason of the fact that he had refused to receive a copy of the summons or other papers which authorized the officer to take the property in con-

troverxy into his possession, where it appeared that he knew the mission of the officer and openly announced his intention to prevent the officer from doing his duty in the premises.

Contempt—Order to Show Cause—Sufficiency.

3. Where defendant, in an action in claim and delivery, appeared in court in obedience to an order to show cause why he should not be punished for contempt, and where the affidavit served with the order stated a contempt, the defendant may not be heard to complain that the judgment of conviction is void in that the order required him to show cause for an unlawful interference with the *process* of the court, whereas he was convicted of an unlawful interference with its *proceedings*.

ORIGINAL application for writ of *certiorari* by the state on the relation of E. H. Bruce, against the district court of the second judicial district in and for the county of Silver Bow, and George M. Bourquin, a judge thereof. Proceedings dismissed.

Mr. J. T. Fitzgerald, for Relator.

Messrs. Sanders & Sanders, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Certiorari. The relator was adjudged guilty of contempt by the district court of Silver Bow county, and by this proceeding seeks to have the judgment of conviction annulled, on the ground that it is void because made in excess of jurisdiction.

From the record it appears that on October 3, 1905, an action was commenced in the district court of Silver Bow county against the relator by one Dennis O'Connell, to recover the possession of a horse and buggy, of the value of \$150; that upon the filing of the complaint summons was issued and delivered to the sheriff with a copy of the complaint for service; that at the same time the plaintiff in the action delivered to the sheriff a proper affidavit and undertaking on claim and delivery, with an order indorsed upon the affidavit directed to the sheriff, requiring him to take the property from the possession of the relator; that the sheriff thereupon directed Patrick F. Meagher, one of his deputies, to serve the summons and take possession

of the property as directed in the order; that the deputy proceeded to the residence of the relator, and, having found him there in the possession of the property, made known to him his mission, and thereupon offered to deliver to him copies of the summons and complaint, and also of the undertaking and affidavit with the order indorsed thereon; that the relator refused to receive them, or any of them; that the relator also told the said deputy that the property was his and that he was going to defend it; that the deputy having told the relator that he was going to take it from the barn where it was locked up, the relator with threatening demeanor said: "You get it! You lay your hands on that lock"; that thereupon the deputy, fearing violence, went for assistance; that upon his return he found that the property had been taken away; and that since that time neither the sheriff nor any of his deputies has been able to find the property and take possession of it under the order in compliance with the statute. On October 12th, the foregoing facts having been made to appear to the court by affidavits filed by plaintiff in the action, and the said Meagher, an order was made requiring the relator to show cause why he should not be punished for contempt for his action in the premises. Upon a hearing the relator was found guilty and sentenced to pay a fine of \$175, and, in default of payment, to be confined in the county jail until payment be made, or until he had served one day for every two dollars thereof.

Contention is made that the judgment of conviction is void, (1) in that it does not appear that the relator unlawfully interfered with the process or proceedings of the court; and (2) in that the order issued to the relator in the contempt proceeding required him to show cause why he should not be punished for unlawful interference with the *process* of the court, whereas he was convicted of an unlawful interference with the *proceedings* of the court.

1. Section 2170 of the Code of Civil Procedure provides: "The following acts or omissions, in respect to a court of justice, or proceedings therein, are contempts of the authority

of the court: * * * 9. Any unlawful interference with the process or proceedings of a court. * * * " This provision defines as a contempt not only any unlawful interference with the process of the court, but also with its proceedings, whether technically falling under the head of "process" or not.

It is said by the relator that any resistance of, or interference by him with, the sheriff in his effort to obey the order of the plaintiff indorsed upon the affidavit, was not an interference with the process of the court, because the order was not made by the court, nor was it authorized by it or issued under its authority. By section 3463 of the Code of Civil Procedure, "process" is defined as a writ issued in the course of judicial proceedings; and the word "writ" is defined as an order or precept in writing, issued in the name of the state, or of a court or judicial officer. The order in question does not fall strictly within the definition of the word "process" as given in this section; but, without stopping to discuss the nature of the order, it is sufficient to say on this point, that it is one of the *proceedings* in an action of this character authorized by statute, and performs the office of process, whether it be called technically "process" or merely a "proceeding in the case." The action of the relator in resisting the officer who was proceeding in obedience thereto and undertaking to accomplish one of the necessary steps in the case authorized by law (Code of Civil Procedure, section 843), was clearly an interference with the proceedings of the court in the cause and was a contempt.

The word "proceeding" applies to any step to be taken in a cause which is authorized by law in order to enforce the rights of the parties or effectuate the proper conduct of it while pending in court. The idea could not for a moment be tolerated that the defendant in an action in claim and delivery could, by a sufficient resistance to the officer, avoid service of the summons and order, and then make such disposition of the property involved that it could not be taken possession of by the

officer and held pending investigation of the question of title, thus defeating the purpose of the action.

The writ of replevin has been dispensed with in this state, and the proceedings provided for under sections 840 et seq. of the Code of Civil Procedure, to gain possession of the property and to hold it pending the trial of the cause, has been substituted in its stead. So that, whether it be called "process" or a "proceeding in the case," any unlawful interference with it by the defendant is a contempt of the authority of the court.

It is also said by counsel for relator that the record shows that at the time of the occurrence of the acts charged as a contempt, the defendant had not been served with summons, and therefore the court had not acquired jurisdiction over him in the action. It is true that, in a technical sense, he had not been served with summons, for, though informed by the deputy that the latter had that process in his hand, he refused to receive the copy of it or of any of the other papers, and at once announced the intention to prevent the taking of the property. Under these circumstances he cannot be heard to say that he did not interfere with the proper conduct of the proceedings of the court in the action. He knew the mission of the deputy sheriff, and knew that he had the summons and other papers authorizing the taking of the property. His behavior was not only a contempt of the authority of the court, but a flagrant one.

2. The second contention, we think, is without merit. The order served upon the defendant directed him to show cause why he should not be punished for contempt of the authority of the court. No complaint is made but that the affidavits state a contempt. Whether the order to show cause should have been more specific in designating the particular contempt is a question that we need not discuss, because the defendant appeared in obedience to the order, and was found guilty after hearing and full investigation of the facts constituting the particular contempt. Besides, the order when served was accompanied by copies of the affidavits setting forth the facts con-

stituting the charge. Such being the case, we are of the opinion that he has no cause to complain.

The writ heretofore issued is set aside and the proceedings dismissed.

Dismissed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. BANK, RESPONDENT, v. TAYLOR, JUSTICE OF
THE PEACE, APPELLANT.

(No. 2,196.)

(Submitted January 3, 1906. Decided January 8, 1906.)

Appeal—Record—Omission of Judgment—Dismissal.

1. An appeal from the judgment will be dismissed, where the only reference in the record that a final judgment had been entered, appears in a copy of the notice of appeal; since, in order to give the supreme court jurisdiction, the record must contain a copy of the judgment. (Code of Civil Proc., secs. 1176, 1736; Session Laws, 1899, p. 146.)

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

PROHIBITION by the state on the relation of Simon Bank to Cornelius Taylor, justice of the peace of South Butte township, Silver Bow county. From the judgment in favor of plaintiff the defendant appeals. Dismissed.

Mr. James H. Baldwin, for Appellant.

Mr. M. F. Canning, and Messrs. Maury & Hogevoil, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Appeal from a final judgment, rendered by the district court

of Silver Bow county upon an application for a writ of prohibition to Cornelius Taylor, the justice of the peace of South Butte township in said county. That final judgment was in fact rendered and entered by the district court appears only from a copy of the notice of appeal found in the record.

On appeal from a judgment the record must contain a copy of the judgment-roll (Code of Civil Procedure, section 1736). There can be no judgment-roll without a copy of the judgment (Code of Civil Procedure, section 1176). Nor does an appeal lie until the judgment has been entered (Code of Civil Procedure, section 1722, as amended by Laws of 1899, page 146). It therefore does not appear from the record that this court has jurisdiction to review and dispose of the cause on its merits, and the appeal must be dismissed. (*Lisker v. O'Rourke*, 28 Mont. 129, and cases cited.) The appeal is dismissed.

Dismissed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. HAIRE, RELATOR, v. RICE, AS STATE TREAS-
URER, RESPONDENT.

33	365
37	102
33	365
30	100

(No. 2,258.)

(Submitted December 20, 1905. Decided January 8, 1906.)

*State Normal School—School Lands—Bonds—Constitution—
Enabling Act—Statutory Construction—Communis Error
Facit Jus.*

Normal School Lands—Bond Issues—Constitutionality.

1. Chapter 3 of Session Laws of 1905 (page 3), authorizing the state board of land commissioners to issue and sell bonds, the proceeds to be applied to the erection, furnishing and equipment of an addition to the state normal school building, and pledging as security, for the payment of the principal and interest on such bonds the lands granted by section 17 of the Enabling Act (25 Statutes at Large, 676), is void because in violation of section 12, Article XI, of the Constitution of

Montana, which provides that the funds of the state institutions of learning, from whatever source secured, shall be invested and only the interest from such funds, together with the rents from leased lands belonging to the normal school grant, devoted to the maintenance of such school.

Constitution—Enabling Act—Construction—Conflict.

2. The supreme court in construing provisions of the state Constitution and of the Enabling Act, under which the former was adopted and the state admitted into the Union, will, in response to a contention that where the Constitution is in conflict with the Enabling Act the former must yield, reconcile, if possible, the provisions of both instruments, since courts will with the greatest hesitation hold inoperative and invalid a provision of the state Constitution.

State Normal School Lands—Enabling Act—Constitution—Conflict.

3. *Held*, that section 17 of the Enabling Act (25 Statutes at Large, 676), which grants certain lands to the state of Montana for the state normal school and provides for the manner in which such lands shall be held and disposed of and the funds derived therefrom applied, and section 12 of Article XI of the Constitution of the state, under which the legislature may prescribe the manner in which the funds shall be loaned, are not in conflict.

Constitution—Contemporaneous Construction.

4. The doctrine of contemporaneous construction only becomes effective when there is a reasonable doubt as to the meaning of the provision to be construed, and acquiescence for no length of time in a construction by co-ordinate branches of the government, which has the effect of nullifying a provision of the Constitution, will justify the courts in adopting such construction unless it is the only reasonable one.

Enabling Act—Construction—*Communis Error Facit Jus*.

5. *Held*, that the construction given to section 17 of the Enabling Act (relating to grants of land to the state normal school and their disposition) by the legislature of Montana, as evinced by legislative authorization of bond issues against the various land grants, has not been so uniform or made under such circumstances as to render applicable the maxim, "*Communis error facit jus*."

State Normal School—Enabling Act—Construction.

6. *Semble*. It would seem that the early assemblies of the state legislature understood that the Congress in the Enabling Act (25 Statutes at Large, 676), relative to grants of land for state normal school purposes, meant that the state should, in the first instance, erect the necessary buildings for such institution out of its own funds, and that the grant made in section 17 of that Act should constitute an endowment for the maintenance and perpetuation of such school.

ORIGINAL application for writ of mandate by the state on the relation of Charles S. Haire, relator, against James H. Rice, as state treasurer, to compel the payment of a warrant against the State Normal School Fund. Dismissed.

Messrs. Carpenter, Day & Carpenter, for Relator.

The provisions of chapter 3, Laws of 1905, are not prohibited by, but are in compliance with, section 17 of the Enabling Act.

The word "establishment" as used in said section 17 means the erection and equipment of buildings from the proceeds of the grants for the purpose of the establishment and maintenance of the institutions sought to be established and maintained. It would be absurd to contend that by "establishment" is meant the simple location of the school of mines, or an Act of the legislative assembly declaring that a school of mines is established and located at a particular place. It would not require one hundred thousand acres or one acre for the legislative assembly to do this, and Congress never intended to make an extensive land grant for that simple formality. What Congress clearly intended was to grant one hundred thousand acres to Montana for the purpose of erecting school of mines buildings, and afterward using the unexpended proceeds and the income in maintaining the institution. The last sentence of section 17 is as follows: "And the lands granted by this section shall be held appropriated and disposed of exclusively for the purposes herein mentioned, and in such manner as the legislatures of the respective states may severally provide."

In arriving at the true meaning of this sentence there should be no mistake as to the legal signification of the different words composing it. "Shall be held," means that the state shall have the legal title to the lands to be selected as in the act provided. To "appropriate," does not mean to select or claim the lands, but to apply the proceeds or income from the lands to fulfill the trust, i. e., to apply such proceeds or income to the establishment and maintenance of the institutions. To "appropriate" in all of the Enabling Acts means to apply to the use or purpose for which the grant was made. To "appropriate" is held by judicial authority to allot, assign or apply in any way to a person or thing for a particular purpose. (*Woodward v. Reynolds*, 58 Conn. 486, 19 Atl. 511; *State v. Bordelon*, 6 La. Ann. 68, 69; *State v. Sioux City etc. Ry. Co.*, 7 Neb. 357, 373; *State v. Derham*, 61 S. C. 358, 39 S. E. 379; *Hoyt v. Story*, 3 Barb. 262, 264.)

There is no restriction as to the disposal of the lands if the purpose (for the establishment and maintenance) is observed. They may be rented, mortgaged or sold. The proceeds may be immediately utilized or they may be pledged, or loaned at interest, and the income used for the purposes mentioned. The granted lands are to be appropriated and disposed of in such manner as the legislature may provide. "In such manner" does not limit the preceding words to mere matters of form. The phrase includes mode, method or way, and the means and instrumentalities by which a thing is to be done. (*Northrop v. Curtis*, 5 Conn. 246, 253; *Fifth Avenue Bank v. Colgate*, 54 N. Y. Super. Ct. (22 Jones & S.) 188, 196; *In re Monk*, 16 Utah, 100, 50 Pac. 810, 811; *City of Erie v. Caulkins*, 85 Pa. St. 253, 27 Am. Rep. 646.)

Congress has always manifested a particular solicitude for the common schools. In all land grants to the states, the first are for the support of such schools. When grants of land for other purposes have been made, Congress has generally regarded the state legislature as the proper authority, in its own way, to appropriate and dispose of the lands for the purposes named, without any restriction, except in special cases, with confidence that the legislature would properly execute the trust. The provisions of sections 11 and 17 are inconsistent with each other, and the provisions of section 17 are to be treated as an exception to the broad language of section 11. The stated purpose of said section is to dispose of all lands granted for (so-called) educational purposes, at public sale, at not less than ten dollars per acre, the proceeds to constitute a permanent school fund, of which the interest only shall be expended for the support of said schools. The purpose of section 17 is to leave to the legislature the disposal in its own way of the lands therein granted—the legislature to apply the proceeds and the income thereof to the establishment and maintenance of certain institutions, without further restriction. By section 11, only the income of lands granted for (so-called) educational purposes is to be appropriated to the support of schools. By sec-

tion 17 the lands granted are to be appropriated to the establishment and maintenance of the institutions therein named. By section 11 all the lands granted for educational purposes are to be disposed of in the manner therein provided. By section 17 the lands granted for the institutions therein named are to be disposed of in whatsoever way the legislature may deem best. By section 11 one permanent school fund is provided for. By section 17 a fund for each institution is contemplated, and also by that section the same method of appropriation and disposal applies to lands granted for the institutions of learning therein named, as to lands granted for public buildings at the capital.

Two propositions, then, seem to be firmly established: 1. That all lands granted for "educational purposes," as these quoted words are used in section 11, do not include lands granted by section 17, and that the word "schools" as used in section 11 means common schools. 2. If the words "all lands granted for educational purposes," as used in section 11, when construed in connection with the remainder, can be held, if said section stood alone, to include the lands specially granted for educational purposes by section 17, the special provisions of section 17 must be taken to constitute an exception to the general provisions of section 11.

It is unnecessary to cite authorities to the effect that the legislature of a state is supreme except where its powers are plainly limited by the Constitution of the United States, or of the state, or, in this case, by the Enabling Act, the terms and conditions of which were accepted by the people in a duly authorized convention. Whether there was an unwise disposition of the funds is not a question for the courts. (*People v. Mayor of Brooklyn*, 4 N. Y. 432; *Spencer v. Merchant*, 125 U. S. 353, 355, 8 Sup. Ct. 921, 31 L. Ed. 766.) "A restriction upon the legislature in respect of a matter which is properly the subject of legislation will not be implied, but must be clearly expressed." (*People v. New York Cent. R. R. Co.*, 24 N. Y. 497; *People v. New York Cent. R. R. Co.*, 34 Barb. 138, 139.)

The Acts providing for the issuance of bonds to aid in the establishment of the various institutions have been similar to chapter 3 for ten years. The often repeated legislative construction has been that these Acts are in no respect in violation of the Enabling Act, or the Montana Constitution, and this construction is entitled to great weight. (*State v. Wright*, 17 Mont. 77, 42 Pac. 103; *State v. Collins*, 21 Mont. 451, 53 Pac. 1114; *State v. Barrett*, 26 Mont. 62, 66 Pac. 504.) Courts adhere to a rule once decided and acquiesced in, and where money has been invested in reliance upon it, the rule will not be disturbed. (*Wetmore v. Parker*, 52 N. Y. 457; *Leggett v. Hyde*, 58 N. Y. 277, 17 Am. Rep. 244.) •

The scheme of the Enabling Act in regard to donations for common schools and the higher institutions of learning is that as to the common schools only the interest of the permanent school fund shall be used for their support, and nothing for buildings, but as to the higher institutions the legislature should be left with a free hand to appropriate the money for their establishment and maintenance as it thought best. Chapter 3 is not repugnant to any part of the Enabling Act, or to any part of Article XI of the state Constitution. In fact, said chapter 3 does not present a case of investing or diversion at all. It is simply a case of borrowing money through state agencies to establish the normal school, and pledging the proceeds and income of the land grant for repayment of the loan without recourse to the state, as the legislature was clearly authorized by section 17 of the Enabling Act to do, and it is difficult to see how any consideration of the provisions of section 12 of Article XI is called for or becomes in any way material in this case.

Mr. M. S. Gunn, and Mr. W. T. Pigott, for Relator.

To what lands does section 11 of the Enabling Act apply? The grant contained in section 10 of that Act is a grant *in praesenti*. When the states were admitted into the Union the title to sections 16 and 36 passed, whether the same were sur-

veyed or unsurveyed. (*Schulenburg v. Harriman*, 21 Wall. 44, 21 L. Ed. 551; *Beecher v. Weatherby*, 95 U. S. 517, 24 L. Ed. 440; *Sherman v. Buick*, 45 Cal. 656; *Daggett v. Boncwitz*, 7 N. E. 900.) Section 17 of the above Act contains a grant of lands "in quantity," and by virtue of the provisions of section 19, the title to such lands could not pass until after there had been a selection, and such selection could not be made until after the lands had been surveyed, and could then be made from such lands only as had not been reserved or appropriated. (*McNee v. Donahue*, 142 U. S. 587, 12 Sup. Ct. 211, 35 L. Ed. 1122; *Patterson v. Tatum*, 3 Saw. 164, Fed. Cas. No. 10,830; *Terry v. Megerle*, 24 Cal. 619, 85 Am. Dec. 84.) We have, then, a grant by section 10 of specific lands, the title to which passed to the states upon their admission into the Union, whether such lands at that time were surveyed or unsurveyed. On the other hand, section 17 did not grant the title to any particular lands, but merely vested the right to a specific quantity to be afterward selected. In view of these considerations, we are irresistibly forced to the conclusion that the lands referred to in section 11 are the specific lands granted by section 10. Any other construction would lead to absurd results. As the lands granted in section 17 are granted in quantity, there could be no reservation of these lands except by reserving all of the public lands in the states mentioned in the Act. Congress could not have intended such a reservation. (*Foley v. Harrison*, 15 How. 444, 14 L. Ed. 766.) The only construction of section 11 that is reasonable and in harmony with section 19 is that the lands referred to therein are the lands granted by section 10. Section 11 necessarily relates to a specific grant, whereas section 19 expressly declares that the lands therein referred to are the lands granted "in quantity" and "as indemnity."

Does the Enabling Act or the state Constitution control? The grant contained in section 17 of the Enabling Act must be construed both as a law and as a contract. (*McGehee v. Mathis*, 4 Wall. 143, 18 L. Ed. 314; *Missouri R. & T. Ry. Co. v.*

Kansas Pac. Ry. Co., 97 U. S. 491, 24 L. Ed. 1095; *Schulenberg v. Harriman*, 21 Wall. 44, 21 L. Ed. 551.) By the Constitution of the United States there is granted to Congress all the powers therein enumerated. To the extent of this grant the people have divested themselves of the attributes of sovereignty. A law is but the expression of the will of the sovereign power. It is impossible, therefore, for any law of a state, whether found in the Constitution or in a statute, to conflict with the Constitution of the United States or any Act of Congress made in pursuance thereof. If a provision of a Constitution or a statute of a state is inconsistent with the Constitution of the United States or an Act of Congress, it is not law. (U. S. Const., Art. VI.) The grants contained in the Enabling Act were made pursuant to Constitution, Article IV, section 3. These grants are laws, and if section 12 of Article XI of the Constitution of Montana is inconsistent therewith, it must yield to the Act of Congress making said grants, which is the supreme law of the land. (*Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185.)

When Congress, by section 17 of the Enabling Act, provided that the lands granted by that section should be held, appropriated and disposed of in such manner as the legislatures of the respective states should severally provide, it created the legislatures of the several states the agents to carry out and perform the trust which was imposed upon the states by the grant made. By virtue of the authority thus conferred upon the legislature it was beyond the power of the people of the state, in the Constitution, to control in any manner the legislature with reference to the holding, appropriation and disposal of such lands.

Having considered the grant as a law, we shall now view it as a contract. When considered as a contract, if section 12 of Article XI of the Constitution of Montana is inconsistent therewith, then such section is within the prohibition of section 10 of Article I of the Constitution of the United States which declares that "no state shall * * * pass any * * * law

impairing the obligation of contracts." (*Gunn v. Barry*, 15 Wall. 610, 21 L. Ed. 212; *McGehee v. Mathis*, 4 Wall. 143, 18 L. Ed. 314.) By section 7 of Ordinance No. 1, relating to federal relations, the constitutional convention accepted of the grants made by the Enabling Act "upon the terms and conditions therein provided." This acceptance created the contract. It follows that if section 12 of Article XI of the Constitution which did not become operative until ratified at the election held on the first Tuesday of October, 1889, is inconsistent with the contract resulting from the acceptance of the grants made by section 17 of the Enabling Act, such section is a nullity by virtue of the contract clause of the Constitution of the United States. If section 12 of Article XI changes the terms of the contract by imposing new conditions or dispensing with those expressed or embodied, it impairs the obligation of that contract. (*State Savings Bank v. Barrett*, 25 Mont. 112.)

Does the Act pursuant to which the bonds were issued contravene section 12 of Article XI of the state Constitution? When section 12 of Article XI is read in connection with the Enabling Act, it clearly means that the funds provided for by that Act, and which are specifically mentioned therein, and any funds which might thereafter be created for either of the other institutions of learning, shall be controlled thereby. It was recognized that funds might be created otherwise than by the sale of the lands granted by the Enabling Act, as reference is made to funds "from whatever source accruing." As the grants made by the Enabling Act were "accepted upon the terms and conditions therein provided," and in the preamble to the Constitution it was declared to be the purpose of the framers of the Constitution to "ordain and establish this Constitution in accordance with the Enabling Act," it cannot be supposed that it was the intention of section 12 of Article XI that the proceeds derived from the sale of the lands granted by section 17 should be treated and held as permanent funds in direct violation of the provisions of the Enabling Act. Fur-

thermore, section 12 of Article XI speaks of funds "dedicated." This could not refer to the proceeds of the lands granted by section 17, as no fund is "dedicated," but the lands are "appropriated."

If, however, section 12 should be construed to mean that the proceeds realized from the sale of the lands granted by section 17 are to be regarded as the "funds" of the different institutions of learning mentioned therein, section 12 may still be construed to harmonize with our construction of the Enabling Act. The fact that the funds are used for the establishment and maintenance of the different institutions does not violate the constitutional command that the same should remain inviolate and sacred to the purposes for which they were dedicated. When used for the purposes contemplated by the Enabling Act, they still remain inviolate and sacred to such purposes. Section 12 does not say that all funds shall be invested, and when read in connection with the Enabling Act, it means that the funds which are not used for the establishment and maintenance of such institutions shall be invested, and the interest and income shall be used as therein provided.

If, however, the court should take the view that this section of the Constitution requires that the proceeds of the lands granted by section 17 of the Enabling Act for a state normal school are funds within the meaning of that term, as used in the Constitution, and that section 12 of Article XI requires all funds to be invested, then we respectfully submit that the same is in conflict with the Enabling Act, and that the Constitution of the United States and the laws enacted in pursuance thereof, are the supreme law of the land, and any provision of the Constitution which is in conflict with the Enabling Act must yield to the Enabling Act and be regarded as of no force or effect whatever.

We further submit that if there is any doubt as to the constitutionality of the Act of 1905, that doubt must be resolved in favor of the validity of the Act. (*Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606; *People ex rel. Robertson v. Van Gas-*

kin, 5 Mont. 352, 6 Pac. 30; *State v. Kenney*, 10 Mont. 410, 25 Pac. 1022; *State v. Broadbent*, 27 Mont. 63, 69 Pac. 323.)

The bonds are payable out of the fund to be created as provided in section 4 of the Act, and the state shall not be held liable for the payment of either the principal or interest. It is impossible, therefore, for any of the funds realized from general taxation to be applied to the payment of said bonds. Under these circumstances no indebtedness is created against the state. (*State v. Cook*, 17 Mont. 529, 43 Pac. 928; *State v. Collins*, 21 Mont. 448, 53 Pac. 1114; *Atkinson v. City of Great Falls*, 16 Mont. 372, 40 Pac. 877.)

Mr. Albert J. Galen, Attorney General, *Mr. W. H. Poorman*, and *Mr. E. M. Hall*, Assistant Attorneys General, for Respondent.

It is apparent from the wording of section 11 of the Enabling Act that it is intended to be a clear and distinct limitation as to all grants of lands mentioned in the Enabling Act and made to the state for educational purposes. It is an independent section and is connected with the balance of the Act of which it is a part, only by the conditions, limitations and permission prescribed and given regarding the disposition of the various land grants mentioned in the Act itself. If this section relates only to the grants mentioned in section 10 of the Enabling Act, why was it necessary to make of it a separate and independent section? In section 10 the term "common schools" is used, while in section 11 the use of this term is studiously avoided and the term "permanent schools" and "school" are used. Why this switching of terms if only the one grant is meant? The "common school fund" is only a part of the "permanent school fund," for the latter includes all the permanent funds of the various educational institutions as will hereafter appear.

The language employed in section 11 is general. It does not limit the application of the section to any one grant, but makes it equally applicable to all the land grants. The word "herein" has a distinct and specific meaning. It is defined by

all lexicographers to mean "in this," substituting this acknowledged meaning of the word for the word itself, and the phrase will read "that all lands in this granted, etc." In this what granted? Not in this section 11, for no grant is made by that section. Certainly not "in this preceding section 10," nor "in this subsequent section 17," but "in this Act of Congress granted." "The words 'herein provided,' or 'not herein provided for,' as used in the United States statutes, generally, if not always, refer to the Act, Chapter or Title, and not to the section. Before the revision they referred to the Act or Chapter, but since, more generally, to the Title." (*May v. Simmons*, 4 Fed. 499. See, also, *State v. Glenn et al.*, 7 Heisk. (Tenn.) 472; *Arthurs' Exrs. v. Butterfield*, 125 U. S. 70, 8 Sup. Ct. 714, 31 L. Ed. 643; *Smythe v. Fiske*, 90 U. S. 374, 23 L. Ed. 47; *Movins v. Arthur*, 95 U. S. 144, 24 L. Ed. 420; *Iasigi v. Iasigi*, 161 Mass. 75, 36 N. E. 579; *Parker v. Iasigi*, 138 Mass. 416; *In re Pearsons' Estate*, 98 Cal. 603, 33 Pac. 451.)

Section 17 of the Enabling Act contains this provision: "And the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the various states may severally provide." But this section nowhere contains any direction as to the appropriation or disposition of the funds received from the sale of the lands granted, nor are such directions found anywhere in the Enabling Act except in sections 11 and 14. Unless, therefore, section 11 and the prohibitions and restrictions expressed in section 14 apply to section 17, the concluding clause of the latter section is entirely meaningless. (*State v. Maynard*, 31 Wash. 132, 71 Pac. 775; *State v. McMillan*, 12 N. Dak. 280, 96 N. W. 310; *Roach et al. v. Gooding et al.* (Idaho), 81 Pac. 642.)

Much stress is laid upon the words "establishment and maintenance" as used in that portion of section 17 of the Enabling Act which grants lands to Montana for educational purposes. It is claimed that such words, as there used, include the erection of buildings. While the words "establishment and main-

tenance" are not used in connection with the grant of lands for said normal schools, and from the punctuation used in said section 17, cannot by any rules of construction be read in as a part of such grant, however, what would be the effect upon such grant if such words were construed to apply thereto? The uniform policy of Congress in making grants of land for educational purposes has been to limit the use of the land so granted and the proceeds derived therefrom to the support and maintenance of such institutions, and to expressly provide that the same shall not be used to erect school buildings. Does section 17 of the Enabling Act by the use of the word "establishment," if that word is to be construed in connection with the normal school grant, change the unbroken policy of Congress heretofore followed in making such grants? None of the definitions of "established" or "establishment" by the Webster, Century and Bouvier dictionaries give such words a meaning synonymous with "build," "erect" or "construct." The words "establish" and "establishment" standing alone are never construed in the sense of "to construct" or "to erect" buildings. They are used in connection with incorporeal rather than corporeal things. (*Village of Brockfort v. Green*, 23 Misc. Rep. 231, 79 N. Y. Supp. 416. See, also, 16 Cyc. 591; 4 Words and Phrases, p. 3004.)

Section 11 clearly shows, beyond any question of doubt, that the lands granted to the state for educational purposes were intended as an endowment, and that the proceeds therefrom were to constitute a permanent endowment fund. Hence it is clear from the context of the Enabling Act that the phrase "for the establishment and maintenance of," as used in section 17, means "for the endowment and maintenance of." See Stroud's Judicial Dictionary, which in defining "establish" says: "Compare 'endow,' and in defining 'endow' says: 'Compare 'establish.'" The authorities all hold that "maintenance" means the running or current expenses, and does not include the construction of buildings. (*Sheldon v. Purdy*, 17 Wash. 135, 49 Pac. 230; *Mitchell v. Colgin*, 122 Cal. 296, 54 Pac. 905; *Roach*

v. *Gooding* (Idaho), 81 Pac. 644.) By construing the word "establishment" to mean "endowment," it is then in harmony with the context of the entire Enabling Act, and is also in harmony with the theretofore unbroken policy of Congress in making grants of land to states for educational institutions.

The construction placed by the constitutional convention of Montana upon all the grants of land in the Enabling Act for educational purposes was that they constitute an endowment for the support, maintenance and perpetuation of such institutions. Sections 2, 3 and 12 of Article XI of the state Constitution clearly show that the constitutional convention never intended that the proceeds received from such grants should ever be pledged or used for the purposes of erecting school buildings. In fact such sections of the Constitution expressly prohibit such use of the funds. Section 8 of the Enabling Act provides that in the formation of the state Constitution all provisions of the Enabling Act must be complied with, and that, upon such compliance, the President must issue his proclamation admitting the state into the Union. The fact that our Constitution was approved and the state admitted shows conclusively that the construction of the Enabling Act adopted by the framers of our Constitution was the construction thereof intended by Congress. Congress certainly expected and intended that the legislature would enact laws not in conflict with the state Constitution which had been adopted in conformity with the provisions of the Enabling Act and approved by Congress through the President.

Is Chapter 3, Laws of 1905, providing for additional buildings and equipment for the state normal college, in conflict with our Constitution? Does it violate the plain provision of section 3 and section 12 of Article XI? If it does, it is unconstitutional, regardless of the provisions of the Enabling Act. If the Constitution throws around the funds in question additional safeguards and limitations, which are not repugnant to those contained in the Enabling Act, they control and must not be violated. Section 2 of Article XI of the Constitution

defines the "public school fund of the state." This fund consists not only of proceeds from the sale of sections 16 and 36 granted for the support of the "common schools," but also of the proceeds from the sale of lands granted for the maintenance of the various educational institutions of the state. Each of these educational institutions is a part of the public school system of the state, as well as the common or district schools. (See *Roach v. Gooding*, *supra*.) The public school fund shall "remain inviolate." "The word 'inviolat' is defined by approved lexicographers to mean 'unhurt, uninjured, unpolluted, unbroken.'" (4 Words and Phrases, 3759; *Flint River Steamboat Co. v. Roberts*, 2 Fla. 114, 48 Am. Dec. 178.) Would the taking of money out of said public school fund and using it to erect school buildings leave the fund "unhurt; uninjured; unbroken; untouched"? That it would not, is self-evident—especially when we consider that buildings must necessarily crumble and decay; that the ravages of time and the elements will within the period of a few generations totally destroy the value of such buildings.

If the fund created from the sale of these lands is to forever remain inviolate, the same to be invested and only the interest and rents to be used, and this use limited to the maintenance and perpetuation of the institutions—certainly all the elements of an endowment fund are contained therein. All the safeguards for the protection of an endowment fund are there set out in unmistakable language. Any Act of the legislature to divert this fund, or to pledge or expend it in any manner, except in an investment which will produce interest and revenue and keep the fund permanent and inviolate, is absolutely unconstitutional; and any Act which authorizes the use of the interest received from the investment of such fund for any other purpose than the maintenance and perpetuation of the institution, is absolutely unconstitutional. The words "maintenance, perpetuation and support" of schools do not include the erection of buildings. (*Sheldon v. Purdy*, 17. Wash. 135, 49 Pac.

230; *Mitchell v. Colgin*, 122 Cal. 296, 54 Pac. 905; *Roach v. Gooding* (Idaho), 81 Pac. 644.)

Chapter 3, Laws of 1905, which attempts to divert these funds by pledging them for the payment of bonds issued for the purpose of securing money to erect school buildings, is in direct violation of all the provisions of section 12 and also of section 3 of Article XI, and therefore unconstitutional, and all bonds issued in pursuance thereof are invalid.

The normal school is a state institution; it is not a corporation; it has no legal entity and cannot contract indebtedness except as authorized by the state. The state board of education is merely an agent of the state to execute the will and command of the state. When acting within the scope of its authority it binds its principal, the state. If the law giving it the authority is void, it does not bind the state, nor does it bind the institution, for the state and not the institution is the principal. Hence, any indebtedness created by this agent, if valid, is a state debt and not a debt against the institution, which has no legal entity and which is only a creation of the state, established and supported by the state (Article X, Const., sec. 1), and at all times under the absolute jurisdiction and control of the state. (Enabling Act, sec. 14.) Only the owners of property can mortgage it or charge it with debt. The state owns these lands as trustee. The title thereof vests in the state as trustee; the proceeds arising from the sales of the land belong to the state as trustee; the interest on such proceeds is state property in trust and the same is true of rents received from leases and moneys derived from the sales of timber growing on such land. In *State v. McMillan*, *supra*, it is held that the bonding of the lands granted for educational purposes, without first submitting the question to a vote of the people, was in violation of the state Constitution limiting the amount of the state's indebtedness. "It makes no difference whether the debt is contracted on the general credit of the state or on the credit of a fund belonging to the state." (*Rodman v. Munson*, 13 Barb. 63; *Newell v. People*, 7 N. Y. 9; *Joliet v. Alexander*, 194 Ill. 457, 62

N. E. 861; *State v. Mills*, 55 Wis. 229, 12 N. W. 359; *Sloan v. State*, 51 Wis. 623, 8 N. W. 393; *Jewell Nursery Co. v. State*, 4 S. Dak. 213, 56 N. W. 113; *Weary v. State University*, 42 Iowa, 335; *State v. White*, 82 Ind. 278, 42 Am. Rep. 496; *Neil v. Board*, 31 Ohio St. 15.)

The Act of 1905 provides that the state shall not be liable for the payment of these bonds, but it does authorize the hypothecation of a part of the property held in trust by the state (the state normal school lands) to secure their payment. Nowhere in the Constitution is the state authorized to act as surety, or to permit its property to be hypothecated for that purpose. It is either liable as principal or not liable at all. A debt cannot exist without both a debtor and a creditor. The purchaser of the bonds is the creditor. Who is the debtor? Surely not the institution, for it has no legal entity and cannot contract a debt. Not the fund derived from the sale of the land, for that constitutes a permanent fund which must forever remain intact and inviolate. It necessarily follows that "the bonds in question are bonds of the state or bonds of no one." (See *State v. McMillan*, 12 N. Dak. 280, 96 N. W. 310.)

And inasmuch as the Act by its terms provides that the state is not liable, it follows that the bonds have no validity whatever.

It is contended by relator that the grants named in section 17 of the Enabling Act are not subject to the limitations expressed in section 11 of that Act, but are wholly at the will of the state legislature with reference to the disposition of the funds arising from the sale of the lands granted. A grant of land to the state for the purpose named in the Act that leaves the state the sole judge of when that purpose is accomplished is not a grant on condition. (*Mills County v. Railway Cos.*, 107 U. S. 557, 27 L. Ed. 558; *United States v. Louisiana*, 127 U. S. 182, 8 Sup. Ct. 1047, 32 L. Ed. 66; *Cook Co. v. Calumet etc. Canal Co.*, 138 U. S. 635, 11 Sup. Ct. 435, 34 L. Ed. 1110.) If, then, this grant is without condition, the state owns these lands the same as though title had been obtained from some other source. Being the owner of the fee simple without

condition or restriction, the state in the exercise of its sovereign authority can either by constitutional provision or legislative enactment, place a restriction upon the use of these funds. Section 12 of Article XI of the state Constitution contains that restriction.

Counsel for relator claims that section 11 of the Enabling Act, because of the use of the word "unsurveyed," was not intended to limit the grants made in section 17 of said Act, and therefore, of necessity, must limit only the grants made in section 10. There is no merit whatever in the contention that by the use of the word "unsurveyed" in section 11 it must be held to apply only to section 10 and not to other grants for educational purposes, for the reason that any argument advanced to show that it does not apply to grants in quantity may be urged with equal force to show that it does not apply to grants including indemnity lands, mentioned in section 10, prior to the survey of the land. If we hold that section 11 does not apply to either section 10 or 17 because of the word "unsurveyed" therein, then the whole of section 11 becomes a nullity and ceases to be a limitation upon any of the grants mentioned in the Enabling Act. But by giving to the word "unsurveyed" in section 11 the construction given to that word, as used in the Enabling Act of Nevada, by the United States supreme court in *Heydenfelt v. Daney Gold etc. Min. Co.*, 93 U. S. 634, 23 L. Ed. 995, the section would stand and be a limitation upon all grants for educational purposes after the lands had been surveyed and selected and the title of the state fully attached thereto. (See, also, *Mining Co. v. Consolidated Mining Co.*, 102 U. S. 167, 26 L. Ed. 126.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The Ninth Legislative Assembly of Montana passed an Act entitled, "An Act to enable the Normal School Land Grant to be further utilized in providing Additional Buildings and Equipment for the Montana State Normal College," approved Febru-

ary 2, 1905. This Act authorizes the state board of land commissioners to issue bonds, sell the same, and apply the proceeds to the erection, furnishing, and equipment of an addition to the present State Normal School building at Dillon. It is provided that the funds realized from the sale or leasing of the lands granted by the United States to Montana for State Normal School purposes (100,000 acres), and the licenses received from permits to cut timber on any of said lands, are pledged as security for the payment of the principal and interest on such bonds, except such sums as may be necessary to pay other bonds heretofore issued. There is the further provision that the state of Montana shall not be liable for the payment of the bonds or the interest. Pursuant to the provisions of this Act, the state board of land commissioners issued coupon bonds to the amount of \$75-000, dated May 1, 1905, in denominations of \$1,000 each, bearing interest at four per cent per annum, payable semiannually, and caused the same to be executed as prescribed by such Act. Thereafter such bonds were duly advertised for sale by the state treasurer, and the state board of land commissioners submitted a bid for said bonds at par as an investment for the permanent common school fund, which bid was accepted, and, presumably, the money for the bonds paid over to the credit of the building fund of the Normal School, although this does not appear affirmatively from the petition filed herein.

This relator, having performed services in connection with the erection of the addition to the State Normal School building, presented a claim for \$1,200 to the executive board of the State Normal School, which was allowed and approved by that board and allowed and ordered paid by the state board of examiners, a warrant issued for the same by the state auditor, and this warrant presented by the relator to the state treasurer, who refused to pay it. Thereupon this proceeding in *mandamus* was commenced to compel the state treasurer to pay said warrant. An alternative writ and an order to show cause issued, and upon the return the state treasurer, represented by the attorney general, moved to quash the alternative writ and dismiss the proceedings,

upon the ground that the petition for the writ does not state facts sufficient to entitle the relator to any relief.

The contention of the respondent is that the Act of the Legislative Assembly above referred to is unconstitutional, first, because the Act authorizes the expenditure of funds received from the sale of the Normal School lands for the payment of these bonds; second, because the issuance of said bonds increases the indebtedness against the state of Montana to an amount in excess of \$100,000; and, third, because the Act authorizes the expenditure of the money for the erection of a building for the State Normal School.

By the provisions of section 17 of the Act of Congress, approved February 22, 1889 (25 Stats. at Large 676), commonly known as the "Enabling Act," there was granted to the state of Montana "For State Normal Schools" 100,000 acres of the public land. Other grants were made for the School of Mines, the Agricultural College, the State Reform School, the Deaf and Dumb Asylum, and the State Capitol buildings; and by other sections of the same Act a grant of seventy-two sections of the public land was made for a University, and grants, additional to those mentioned in section 17, for the State Capitol buildings and Agricultural College. Other like grants of land were made by the same Act to the states of North Dakota, South Dakota and Washington, and of the grants made by section 17 it is said: "And the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective states may severally provide."

Section 5 of the Act of February 2, 1905 (Laws 1905, p. 5), provides that the state treasurer shall keep all moneys derived from the sale, leases, or sale of timber from lands granted in aid of the State Normal School, in a separate fund to be known as the "State Normal School Fund," and out of this fund he shall pay the interest on these bonds as it accrues, and the principal at maturity.

Section 12 of Article XI of the Constitution of Montana provides: "The funds of the State University and of all other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be prescribed by law, and shall be guaranteed by the state against loss or diversion. The interest of said invested funds, together with the rents from leased lands or properties, shall be devoted to the maintenance and perpetuation of these respective institutions."

Beyond question the State Normal School is one of the institutions of learning to which reference is here made, and, as it is the only one with which we are directly concerned in this proceeding, we may paraphrase section 12 above as follows: The funds of the State Normal School, from whatever source secured, shall be invested as prescribed by law, and the interest from such invested funds, together with the rents from leased lands belonging to the Normal School grant, shall be devoted to the maintenance of such Normal School. The provisions of this section of the Constitution are mandatory and prohibitory. (Sec. 27, Art. III.) *The funds* referred to mean *all* funds. They shall be invested *to draw interest*, and used for no other purpose. The interest from such invested funds, and the rents from lands belonging to this grant, which have not been sold—and not the principal sum derived from the sale of such lands or from the sale of timber—shall be used for the maintenance and perpetuation of the Normal School, and for no other purpose. If, then, the principal sum received from the sale of lands belonging to the Normal School grant must be invested to draw interest, that principal sum cannot be used to pay off the principal of or interest on the bonds authorized by the Act of February 2, 1905, as provided by such Act.

It is apparent from the most casual reading of section 12 of Article XI of the Constitution, and section 5 of the Act of February 2, 1905 (Laws 1905, p. 5), above, that as soon as the treasurer receives any moneys from the sale of Normal School lands

or timber therefrom into "The State Normal School Fund" such moneys shall be invested to draw interest, under such regulations as may be prescribed by law, and that only the interest on such invested funds, together with the rents from leased lands, can be devoted to the maintenance and perpetuation of the Normal School. If this section of the Constitution is to be given force and effect, it is apparent that the Act in diverting the moneys received from the sale of Normal School lands, or the sale of timber therefrom, to the payment of these bonds, is in direct violation of the provisions of this section of the Constitution.

But on behalf of the relator it is contended that by the terms of section 17 of the Enabling Act the lands granted to the state for Normal School purposes are to be held, appropriated, and disposed of for Normal School purposes in such manner as the legislature of Montana may provide, and that this Act is sufficiently broad to warrant the legislature in borrowing money and pledging such lands for the payment of the principal and interest. And it is further contended that, if section 12 of Article XI of the Constitution contravenes the provisions of section 17 of the Enabling Act, section 12 is invalid and of no force or effect. It is perfectly apparent, then, that, in order to hold the Act of the legislature approved February 2, 1905, binding and the bonds issued in pursuance thereof valid, this court must hold section 12 of Article XI of the Constitution inoperative and of no effect. However, as the Constitution of Montana is the supreme law of this state, aside from the provisions of the Constitution of the United States and the treaties made and statutes enacted in pursuance thereof, it becomes incumbent upon this court to reconcile, if possible, the provisions of our Constitution with the Enabling Act under which the Constitution was adopted and the state admitted into the Union; for, however reluctant a court is to declare unconstitutional and invalid an Act of a legislative assembly, it will with even greater hesitation hold inoperative and invalid a provision of a state Constitution.

It is to be observed that the lands granted to the state by the Enabling Act are granted for specific purposes which are clearly defined: 100,000 acres are granted for State Normal Schools, and the only limitation upon the grant is that such lands shall be held, appropriated, and disposed of exclusively for the purposes mentioned, in such manner as the legislature may provide. Under section 17 above the legislature might designate the agent to select and classify the lands. It might specify that the lands should be sold at private sale or at public auction. It might specify the quantity of land to be sold at any one time or the amount to be sold to any one individual. It might provide the terms upon which the land should be sold, and the price to be received for it. It might make suitable provision for renting the land, and fix the amount to be let to any one person and the price at which it should be let; and, finally, it might make provision for the sale of growing trees upon the lands selected under the terms of this grant. All of these provisions in section 17 were met by legislative enactments comprised in Title VIII, Part III, of the Political Code.

The question now arises: Does section 12 of Article XI of the Constitution contravene the provisions of section 17 of the Enabling Act? Is there any conflict between the provisions of the Enabling Act which grants to the state legislature authority to prescribe the manner in which these Normal School lands shall be held, appropriated, and disposed of, and the provisions of section 12 of Article XI of the Constitution, which provides that the funds of the State Normal School shall be invested, and only the interest from the invested funds, together with the rent from leased lands, may be used for the maintenance and perpetuation of the State Normal School? We are of the opinion that there is no conflict whatever. Under the provisions of section 17 of the Enabling Act the legislature has to do only with the *manner* of the management and disposition of the *lands* themselves, and cannot control the funds derived from sales or leases, except in conformity with the constitutional provisions of section 12 of Article XI above.

The lands were granted to the state of Montana, not to the Legislative Assembly. The legislature may say how the lands shall be held; but it is the state which holds them, which has title to them. It is the state which says what shall be done with the lands. The legislature may prescribe the manner of holding or disposing of them, but the title passes from the state, and the funds derived from sales or leases pass to the state, to be disposed of by the state as it may see fit, subject only to the condition that they shall be used exclusively for Normal School purposes. The state may act through its constitutional convention, and, if it does so, such action is conclusive. In the absence of constitutional provision, it may act through its legislative assembly. Therefore, when the Constitution says that all moneys coming into the State Normal School fund, from whatever source, shall be invested and only the interest and rental from leased lands shall be used for Normal School purposes, the legislature may prescribe the manner in which the funds shall be loaned, but it cannot say that they shall go into any other channel. The absence of any constitutional provision respecting the grant for Capitol Building purposes, and the grant of the Penitentiary at Deer Lodge City and the lands connected therewith, left the legislature free to make such disposition of these grants as it saw fit, so long as the original purpose of the respective grants was observed.

In the very highest sense the purpose of the grant in aid of the State Normal School is observed and carried into effect by section 12 of Article XI of the Constitution. In the wisdom of the framers of that instrument provision is made for the support of our State Normal School for all time. The principal sums derived from the sales of the lands or of timber are made to serve this institution by earning interest which may be applied to its maintenance and perpetuation, while the principal sums themselves are kept inviolate.

A great deal of consideration was given by counsel to the question whether or not the language of section 11 of the Enabling Act modifies the language of section 17; and, while we

are of the opinion that it does not do so, under our view of the case it is not necessary to give further attention to this feature of the case. Neither are we disposed to enter into a discussion now as to whether the bonds authorized by this Act increase the state debt.

So far as the other question is concerned, it need only be noticed in passing. The United States granted 100,000 acres of land to Montana "for State Normal Schools." The Congress was only concerned in seeing that this grant was applied to the purpose for which made. It was apparent that, in order to be available, the lands must be utilized, and the Congress therefore left it to the legislature of this state to designate the manner in which such lands should be held, appropriated, or disposed of; but it went no further than this. It did not attempt to say when the Normal School should be instituted, how many Normal Schools should be established, or how the funds derived from the sale or leasing of these lands should be controlled or made to work out most effectually the end sought by the grant.

The constitutional convention adopted Ordinance No. 1, whereby the grant of these lands was accepted upon the terms and conditions provided in the Act; and as an extra precaution and as an additional safeguard section 12 of Article XI of the Constitution was adopted, making the grant in fact an endowment, and only the interest and rental immediately available for the use of the school, and such interest and rental may be used for any legitimate purpose connected with the maintenance or perpetuation of the school.

But it is said that other like bond issues have been made against these various land grants, and that for a number of years the legislative and executive branches of this state government have given to section 17 of the Enabling Act the construction for which contention is now made by this relator, and that such construction ought to be given great weight by this court. But, as said before, such construction has the effect of nullifying a section of our state Constitution, and this court ought to be slow indeed to declare such a result, no matter if the legisla-

tive and executive branches of the state government may have done so. Furthermore, the rule that contemporaneous construction by the department specially delegated to carry ~~into~~ effect a particular provision of law shall raise a strong presumption that such construction rightly interprets the provision, only becomes effective when there is a reasonable doubt as to the meaning of the provision. Such construction can never abrogate the text or fritter away its obvious sense. And acquiescence for no length of time in a construction by the co-ordinate branches of government which has the effect of nullifying a provision of the Constitution will justify a court in adopting such construction unless it is the only reasonable one. (Cooley's Constitutional Limitations, 7th ed., 104-106.) Furthermore, such construction, to be available as an argument, must have been uniform, and such is not the fact with reference to the subject now under consideration.

The Enabling Act was passed February 22, 1889, and it is not contended that any attempt was ever made by the legislative or executive departments of the state government to give to section 17 the construction now claimed for it by relator prior to March 6, 1895, when the first of these bond issues was authorized (Political Code, sections 1630-1637), so that the construction thereafter given by the legislature was not in fact contemporaneous with the passage of the Act. But, on the other hand, the constitutional convention met in July, 1889, and adopted section 12 of Article XI as the expression of its interpretation of section 17 of the Enabling Act and the Second Legislative Assembly passed an Act entitled "An Act to Provide for the Selection, Location, Appraisal, Sale, and Leasing of State Lands," approved March 6, 1891 (Laws 1891, p. 174a), by the terms of which it is specifically provided that all moneys derived from the sale of these lands shall be invested, and only the interest of such invested funds and rental from leased lands shall be used for the purpose for which the grant was made. These provisions were re-enacted in an act of the Third Legislative Assembly, approved March 9, 1893 (Session Laws, 1893, p.

49), and again re-enacted in a Code provision (section 3509, Political Code) approved February 25, 1895. Thus, within five months after the Enabling Act was passed, we have a construction of section 17 of it, by the constitutional convention, directly opposed to the view now urged by relator, and we further have apparently the same construction placed upon it, or at least an attempt to carry into effect the idea of the framers of the Constitution, by every session of the legislature, barring the first—which did not accomplish anything in the way of legislation—from the time of the passage of the Enabling Act to March 6, 1895; and it does not affect the result to say that the various institutions had not been established prior to 1893.

It would seem that the early sessions of our legislature understood that the Congress meant that the state of Montana should in the first instance build the necessary buildings for a State Normal School out of its own proper funds, and that this bounty should constitute an endowment for the maintenance and perpetuation of such school for all time to come thereafter; and that this was the construction given to section 17 of the Enabling Act by our legislative assembly is demonstrated by the action taken by it at the time these several state institutions were established. The Third Legislative Assembly provided for the establishment and location of the Agricultural College, the University, the Normal School, and School of Mines, and made an appropriation for each of these institutions. That for the State Normal School is similar to the others, and provides for an appropriation of \$15,000, and respecting this appropriation the Act says: "The money hereby appropriated shall be expended under the direction of the state board of education, in the manner and under such restrictions as may be provided by law, and for the purpose of establishing said State Normal School, by commencing the construction of suitable buildings for maintenance of said State Normal School." It was clearly the understanding of the legislative assembly at that time that the state itself must erect the buildings, and it provided for the commencement of such work evidently with the idea that future

legislatures would make other appropriations to complete the work then initiated. So that the construction given to section 17 of the Enabling Act by the Montana legislature has not been uniform, even if the terms of that section were of doubtful meaning, which does not appear to be the fact. We do not think that the construction given to that section since 1895 has been done under such circumstances, or that the result to be anticipated from a different construction now by the courts is of such character as to render applicable here the maxim, "*Communis error facit jus.*"

While we do not agree with the reasoning of the supreme courts of Washington and North Dakota respecting the meaning of section 11 of the Enabling Act, it is interesting to note that they have held legislation of the character of the Act of February 2, 1905, invalid, and bond issues similar to that authorized by our legislature void, and that, too, under the same Enabling Act and somewhat similar constitutional provisions. (*State ex rel. Heuston v. Maynard*, 31 Wash. 132, 71 Pac. 775; *State ex rel. Board v. McMillan*, 12 N. Dak. 280, 96 N. W. 310.) The Act of the legislature now under consideration in authorizing the expenditure of moneys received from the sale of Normal School lands, or the timber on lands granted in aid of the State Normal School, for the payment of these bonds or the interest accruing thereon, is in direct violation of the provisions of section 12, Article XI, of the State Constitution, and is therefore void and of no effect; and, being so, the state treasurer rightly refused to proceed under it and cannot be coerced by *mandamus*.

The alternative writ of *mandamus* is quashed and these proceedings are dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY CONCURS.

MR. JUSTICE MILBURN: I concur in the order and in the opinion. I think it is well, however, inasmuch as a great deal is said in the opinion, and very properly, in regard to contemporaneous construction, that the statements made in the body of the bonds

themselves in respect of the validity thereof should appear. Section 3470 of the Political Code declares that the governor, the superintendent of public instruction, the Secretary of State, and the attorney general shall constitute the state board of land commissioners. As appears from an inspection of the bonds, these officers signed each of said bonds. In each bond appears the following statement: "It is hereby recited and certified that this bond is issued in strict compliance with and conformity to * * * the Constitution and laws of the state of Montana, and that all acts, conditions and things required and necessary to be done precedent to the issuance of this bond, and in the execution thereof, have been duly, properly, regularly and legally done, had and performed, and the full faith and diligence of the state board of land commissioners are hereby irrevocably pledged for the faithful collection and application of said funds for the payment of this bond and the interest thereon as herein and in said Act provided." As shown in the opinion, the bonds are not in compliance with the Constitution. I think it proper that this construction of the law by the several executive officers of the state, who are the present incumbents of the said offices and who signed the bonds, given at the time of the issuance of the bonds, should appear as part of the history of the case.

That part of section 17 of the Enabling Act saying that "the lands granted * * * shall be held, appropriated, and disposed of exclusively for the purpose herein mentioned, in such manner as the legislatures of the respective states may severally provide," means, in my opinion, in a few words, this: That the legislature may say *how* the lands may be sold, but does not mean that they shall say what shall be done with the proceeds. The Constitution, in my opinion, is controlling in the matter, and is not in violation of any of the provisions of the Enabling Act.

Rehearing denied February 27, 1906.

Appeal taken to supreme court of the United States.

KALISPELL LIQUOR AND TOBACCO COMPANY, RESPOND-
ENT, v. MCGOVERN ET AL., DEFENDANTS; KIPP, APPEL-
LANT.

(No. 2,217.)

(Submitted January 8, 1906. Decided January 22, 1906.)

*Contracts—Sales—Statute of Frauds—Original Obligations—
Trial—Appeal—Variance—Nonsuit—Evidence—Indians—
Contracts Other than for Intoxicating Liquors.*

Appeal—Variance.

1. The question of variance will not be considered when raised for the first time on appeal.

Statute of Frauds—Promise to Answer for Debt of Another.

2. An oral promise to pay for goods purchased by another, in case the latter failed to pay for them, is void under the statute of frauds.

Statute of Frauds—Promise to Pay Debt of Another—Original Obligation.

3. The promise of one to pay a debt owing by another, in consideration of the release of the promisor's property from attachment, is an original obligation which need not be in writing.

Sales—Action for Price—Trial—Variance.

4. Where the contract sued upon was one under which defendant purchased the goods described in the complaint, and recovery was had upon one made by defendant subsequently to the time the goods were sold, by which he agreed to pay for the goods sold and delivered to his codefendant, in consideration of the release of his property from attachment, there was a fatal variance between the allegations of the complaint and the proof.

Nonsuit—Variance—Failure to Object to Testimony.

5. Defendant is not precluded from moving for a nonsuit upon the ground of a fatal variance between the allegations of the complaint and the proof, by his failure to object to the introduction of testimony by plaintiff.

Variance—When Failure of Proof.

6. Where the contract upon which recovery is had is wholly different from the one set forth in the complaint, the case is brought within section 772 of the Code of Civil Procedure, which provides that in such a case the variance is not to be deemed immaterial, but must be considered a failure of proof.

Indians—Contracts—Intoxicating Liquors—Evidence.

7. Where recovery was had on a contract other than for intoxicating liquors sold to defendant, the district court properly excluded evidence and refused instructions relative to defendant's status as an Indian maintaining tribal relations.

*Appeal from District Court, Flathead County; D. F. Smith,
Judge.*

ACTION by the Kalispell Liquor and Tobacco Company against Thomas McGovern and Joseph Kipp. From a judgment in favor of plaintiff and from an order denying him a new trial, defendant Kipp appeals. Reversed.

Messrs. Noffsinger & Folsom, for Respondent.

A nonsuit will not be granted where the evidence is conflicting or leaves a question material to the case in doubt. (*Simpson v. Applegate*, 67 Cal. 471, 8 Pac. 39; *Pacific Mutual Life Ins. Co. v. Fisher*, 109 Cal. 566, 42 Pac. 154; *Frank v. Atlanta etc. Co.*, 72 Ga. 341; *Lingenfelter v. Louisville Ry. Co. (Ky.)*, 4 S. W. 185; *Fellows v. Barton*, 66 Barb. (N. Y.) 608; *Ball Electric Light Co v. Sanderson Bros. Steel Co.*, 60 Hun, 576, 14 N. Y. Supp. 429; *Rumsey v. New York etc. R. R. Co.*, 63 Hun, 200, 17 N. Y. Supp. 672.)

Parties to a litigation may consent to the trial of an action other than that pleaded, thus waiving the objection that the *allegata* and *probata* do not agree. Consent is inferable from the fact that evidence of the substituted cause was received without objection. (*Kaufman v. Bloch*, 5 Misc. Rep. 404, 55 N. Y. St. Rep. 390, 25 N. Y. Supp. 758; *Frear v. Sweet*, 118 N. Y. 454, 23 N. E. 910; *Iselin v. Griffith*, 62 Iowa, 668, 18 N. W. 302; *Foltz v. Hardin*, 139 Ill. 405, 28 N. E. 786; *Akers v. Kirk*, 91 Ga. 590, 18 S. E. 367; *Davis v. Patrick*, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826; *Hermiston v. Green*, 11 S. Dak. 81, 75 N. W. 819; *Fallon v. Lawler*, 102 N. Y. 228, 6 N. E. 392; *Baily v. Hornthal*, 154 N. Y. 648, 61 Am. St. Rep. 645, 49 N. E. 56. See, also, *Salazar v. Taylor*, 18 Colo. 538, 33 Pac. 369; *Rio Grande etc. Ry. Co. v. Rubenstein*, 5 Colo. App. 121, 38 Pac. 76; *Murray v. Meade*, 5 Wash. 693, 32 Pac. 780; *Bailey v. Hornthal*, *supra*; *Adams v. Castle*, 64 Minn. 505, 67 N. W. 637; *Kurz v. Forquer*, 94 Cal. 91, 29 Pac. 413.)

"A promise to pay the debt of another is not within the statute of frauds, and need not be in writing, if it is based upon a valuable consideration independent of the original debt, moving between the parties to the new promise, or even

from the original debtor to the promisor; and when such a consideration exists it makes no difference in regard to the application of the statute whether the original debtor remains liable or not." (*Cross v. Richardson*, 30 Vt. 641; *Mallory v. Gillette*, 21 N. Y. 412. See, also, cases of *Davis v. Banks*, 45 Ga. 138; *Mitchell v. Griffin*, 58 Ind. 559; *Ludwick v. Watson*, 3 Or. 256; *White v. Rintoul*, *supra*.)

Mr. M. D. Baldwin, and *Mr. Sidney M. Logan*, for Appellant.

There was no proof of a delivery of goods to the defendant Kipp nor to Kipp and McGovern jointly. There was no proof of any contract between the plaintiff and the defendant Kipp and as no guaranty was alleged in the complaint or otherwise involved in the issues we submit there was a total failure of proof. (*Maul v. Shultz*, 19 Mont. 340, 48 Pac. 626; *Newell v. Meyerndorff*, 9 Mont. 254, 18 Am. St. Rep. 738, 23 Pac. 333, 8 L. R. A. 440; *Newell v. Nicholson*, 17 Mont. 389, 43 Pac. 180; *Childs v. Ptomey*, 17 Mont. 502, 43 Pac. 714; *Finch v. Kent*, 24 Mont. 274, 61 Pac. 653; *Pomeroy's Code Remedies*, sec. 553; *Johnson v. Moss*, 45 Cal. 515; *Bryan v. Tormey*, 84 Cal. 126, 24 Pac. 319; *Hefferlin v. Karlman*, 29 Mont. 151, 74 Pac. 201; *Elmore v. Elmore*, 114 Cal. 519, 46 Pac. 458; *Talbott v. Heinze*, 25 Mont. 10, 63 Pac. 624; *Shirmer v. Drexler*, 134 Cal. 139, 66 Pac. 180; *Wortman v. Montana Cent. Ry. Co.*, 22 Mont. 266, 56 Pac. 316; *Davis v. Pacific Tel. & Tel. Co.*, 127 Cal. 321, 59 Pac. 698; *Westerfield v. New York etc. Ins. Co.*, 129 Cal. 68, 58 Pac. 92, 61 Pac. 667; *Roche v. Baldwin*, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903.)

If the original promisor is not released and the plaintiff has any remedy as against him, the promise of the surety is not an original promise and is void. (Brandt on Suretyship and Guaranty, 1st ed., sec. 62, p. 80; *Harris v. Frank*, 81 Cal. 284, 22 Pac. 856; *Tyler v. Tualtin Academy*, 14 Or. 485, 13 Pac. 329; *Adams v. Wallace*, 119 Cal. 68, 51 Pac. 14; *Clay v. Walton*, 9 Cal. 329.) The exceptions provided by section 3612 of the Civil Code are merely the same exceptions as have always been

recognized by the courts, and should be construed in light of the adjudications on the subject.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was commenced in the justice of the peace court, where service of summons was had upon the defendant Kipp, but not upon the defendant McGovern. The complaint states a cause of action for \$91.42 for goods, wares and merchandise sold by the plaintiff to the defendants. The defendant Kipp made answer denying generally the allegations contained in the complaint, and, as a further defense, set forth the fact that he is an Indian, resides on an Indian Reservation, has never severed his tribal relations, and that the goods sold by the plaintiff consisted of vinous and spirituous liquors. The plaintiff had judgment, and defendant Kipp appealed to the district court, where the plaintiff again prevailed; and from the judgment entered therein and from an order denying him a new trial, defendant Kipp appeals to this court.

Three questions are directly urged upon our consideration: (1) Was there a fatal variance between the allegations of the complaint and the proof adduced at the trial? (2) Was the defendant Kipp's promise to pay for the goods invalid under the statute of frauds? and (3) Did the court err in excluding testimony and instructions offered by defendant relative to his status as an Indian?

Upon the trial in the district court the plaintiff offered evidence tending to prove that Kipp had brought McGovern to the plaintiff's place of business and had introduced him as a prospective customer, and had agreed to pay for such goods as McGovern might purchase, in case McGovern did not do so. This promise, if made, was not in writing and confessedly void under the statute of frauds. The evidence, however, further tends to prove that afterward plaintiff commenced an action against Kipp and McGovern to recover upon this same cause of action, and attached certain property belonging to Kipp;

that thereupon Kipp promised to pay the bill if the action was dismissed and the attached property released. All of this evidence was admitted without objection. At the close of plaintiff's case the defendant moved for a nonsuit, upon the ground that there was a fatal variance between the allegations of the complaint and the proof.

On behalf of respondent it is said that, admitting that the variance is otherwise fatal, it was in this instance waived by the defendant Kipp by not objecting to the testimony when offered, and numerous cases are cited in support of this rule. But we think the rule is subject to this qualification: "provided the attention of the trial court is not directed to the variance." In other words, the question of variance will not be considered when raised in the appellate court for the first time. (*Southmayd v. Southmayd*, 4 Mont. 100, 107, 5 Pac. 318; *First Nat. Bank v. McAndrews*, 7 Mont. 150, 158, 14 Pac. 763; *Nyhart v. Pennington*, 20 Mont. 158, 161, 50 Pac. 413.) But the variance is not waived if timely objection is made and the attention of the trial court directed to it.

The question, then, presented is: May such objection be made by motion for nonsuit? And this question is answered and the contention set at rest by the former decision of this court. (*Wortman v. Montana Central Ry. Co.*, 22 Mont. 266, at 285, 56 Pac. 316; *Johnson v. Moss*, 45 Cal. 515.) In this latter case it is said: "No objection was taken to the testimony as it was introduced; but the defendant was not thereby precluded from moving for a nonsuit, on the ground that it failed to prove the contract declared on."

The contract sued upon was one under which the defendant Kipp purchased the goods described in the complaint. Recovery was had upon a contract made by the defendant Kipp subsequently to the time the goods were sold and delivered, by which he agreed to pay for the goods in consideration of the release of his property from attachment. Under the authority of *McCormick v. Johnson et al.*, 31 Mont. 266, 78 Pac. 500, this promise was not within the statute of frauds. But it can-

not be said that such variance was an immaterial one which the court might disregard under the provisions of sections 770 and 771 of the Code of Civil Procedure. The contract upon which recovery was had was wholly different from the one set forth in the complaint and brings the case within the provisions of section 772 of the Code of Civil Procedure.

We are of the opinion that the court did not err in excluding the testimony, or in refusing to give the instructions, offered by the defendant, relative to his status as an Indian. Upon the theory of the case as presented by the plaintiff in its evidence, Kipp's promise was founded upon a contract made subsequently to the time the goods were sold and delivered, and therefore it was immaterial whether he was an Indian or a white man, for the contract upon which recovery was had was not for intoxicating liquors sold to Kipp—a transaction unenforceable, if Kipp is an Indian maintaining tribal relations.

As the testimony of the defendant did not aid the plaintiff's case, we are of the opinion that the court erred in refusing to grant the nonsuit.

The judgment and order are reversed, and the cause remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

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36 281

**MONTANA ORE PURCHASING COMPANY, RESPONDENT,
v. BOSTON AND MONTANA CONSOLIDATED
COPPER AND SILVER MINING COMPANY, AP-
PELLANT.**

(No. 2,198.)

(Submitted January 3, 1906. Decided January 22, 1906.)

*Costs—Appeal—Order Taxing Costs—Bills of Exceptions—
Stenographer's Copies—Excessive Charges—Briefs—Remit-
titur.*

Appeal—Necessary Disbursements—What Constitutes.

1. Disbursements necessarily made to secure the review of a case are a part of the costs necessarily incurred.

Costs—What Items Recoverable.

2. Only such items of disbursements may be recovered by the successful party as are provided by section 1866 of the Code of Civil Procedure.

Costs—Bills of Exceptions—Stenographer's Copies.

3. The cost of copies of stenographers' notes of the testimony, used in the preparation of bills of exceptions, is a proper item of disbursements under section 1866 of the Code of Civil Procedure, which the successful party may recover, even though such copies were procured from day to day during the progress of the trial and prior to a final decision.

Costs—Stenographers—Verbatim Copies—Excessive Charges.

4. A charge of ten cents per folio, in a memorandum of costs, for verbatim copies of the testimony incorporated in a bill of exceptions, as permitted by the Rules of the Supreme Court (Rule VII, 30 Mont. xxxiv, 82 Pac. ix, is excessive, the legal fee, under Code of Civil Procedure, section 373, being five cents per folio.

Costs—Transcripts—Excessive Charges.

5. Where the principal part of a transcript, consisting of 15,010 folios, was made up of copies of evidence obtained from the stenographer, chargeable at five cents per folio (Code of Civil Procedure, section 373), and but a small portion prepared by the clerk of the district court, for which ten cents per folio is the proper charge (Political Code, section 4636), a charge of ten cents per folio for the whole number of folios contained in the transcript was excessive.

District Courts—Costs—Appeal—Briefs.

6. District courts do not possess the power, on a motion to tax the costs of an appeal, to disallow an item for supplemental briefs used in the appellate court, the question of the necessity of such briefs being one for the supreme court to decide.

District Courts—Appeal—Costs—Transcript.

7. District courts have no power to say, on a motion to tax the costs of an appeal, that any portion of the transcript on appeal should have been omitted as unnecessary, the supreme court being the exclusive judge of what the record on appeal shall contain in order to present appellant's case to it for review.

Appeal—Transcript—Printing by Contract—Cuts—Improper Charge.

8. The district court, on a motion to tax the costs of an appeal, properly struck out an item charged for cuts used in the printed transcript and made expressly for that purpose, where the printing was done by contract at a certain rate per page, since the contract price only was properly chargeable.

Costs—Appeal—Remittitur—Supreme Court Opinion—Copy.

9. Where a judgment or order of the trial court is reversed or modified, a copy of the opinion of the supreme court must accompany the remittitur (Rule XIX of Supreme Court, 30 Mont. xlii, and it was error for the district court, on a motion to tax the costs of an appeal, to disallow an item charged for a copy of such opinion.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

From an order taxing the costs of an appeal, the defendant appeals. Modified.

Mr. James M. Denny, for Respondent.

Messrs. Forbis & Evans, for Appellant.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On appeal to this court from a judgment in favor of plaintiff and an order denying defendant's motion for a new trial, the order was affirmed, but the judgment was modified and the defendant was permitted to recover one-half of the costs of the appeals. (*Montana Ore Pur. Co. v. Boston & Montana Con. etc. Min. Co.*, 27 Mont. 288, 70 Pac. 1114, 27 Mont. 536, 71 Pac. 1005.) Within thirty days after remittitur went down, the defendant filed with the clerk of the district court its verified memorandum of costs. The plaintiff then moved that court to tax the bill by striking out each item thereof. The motion was sustained as to certain of the items as a whole and certain others in part, but denied as to the rest. Thereupon defendant appealed from the order as a special order after final judgment. (*Ryan et al. v. Mazey*, 15 Mont. 100, 38 Pac. 228.)

The contention is made that the court erred in striking out any item as a whole or in part. An item of \$1,424.75 for 14,247½ folios of copies of the stenographer's notes of the testimony used in the preparation of bills of exceptions was stricken

out, on the ground that the expense for it had been incurred during the trial and before it was known what the result would be. The evidence as to this item shows that copies of the testimony were furnished to the respective parties from day to day during the trial by two stenographers who took the notes of it; that they were paid for by the parties obtaining them, and that the copies thus obtained were used by the defendant in preparing its bills of exception. It is said by the plaintiff that, since the expense of these copies had already been incurred, it cannot be claimed by defendant that the expense was necessary at the time the bills were prepared, and hence that the expense for them cannot be included in a charge for necessary disbursements under the statute. (Code of Civil Proc., sec. 1866.) This section provides: "A party to whom costs are awarded in an action is entitled to include in his bill of costs, his necessary disbursements as follows: * * * the legal fees paid stenographers for *per diem* or for copies; * * * the reasonable expense in making transcript for the supreme court."

This court has always observed the rule that no item of disbursements may be recovered by the successful party which does not come within the statute. It was so held on the former appeal in this case. (27 Mont. 288, 70 Pac. 1114.) The question, then, is: Does this item fall within the terms of the statute? The words of the statute are "the legal fees paid stenographers for *per diem* or for copies." The *per diem* here referred to is the fee required to be paid by each party at the beginning of the trial. (Code of Civil Proc., sec. 374.) So the word "copies" refers, not to the copies ordered by the parties from day to day to be used only as an aid in the examination of witnesses, but to such as are furnished for the purpose of making up bills of exceptions, either during or after the close of the trial, or statements on motion for new trial. (Code of Civil Proc., sec. 373.) The copies in question we think fall within the rule. They were actually used for the purpose indicated; and necessarily so, since no proceeding could have been instituted to have the action of the district court upon the trial of the case reviewed on mo-

tion for new trial and on appeal, and the review by this court would otherwise have been confined to such questions only as arose upon the face of the judgment-roll. The disbursements necessarily made to secure a review of a case are a part of the costs necessarily incurred. Such being the case, the fact that these copies were ordered during the trial and prior to a final decision does not prevent a recovery of the amount paid for them, within the limitation fixed by the statute. If they had not already been obtained, it would have been necessary to incur the cost of them at the time they were used.

The amount charged in the bill is excessive, however. The legal fee for such copies is five cents per folio, when they are verbatim transcripts. (Code of Civil Proc., sec. 373, *supra*.) In this case the defendant, as a precautionary measure and by the order of the district court, incorporated in the bills of exception verbatim copies of the testimony, as was permitted by the rules of this court. (Rules 1899, Rule VII, subdivision 3, 22 Mont. xxxi; Rules 1905, Rule VII, 30 Mont. xxxiv, 82 Pac. ix.) The charge for these copies should therefore have been five cents per folio, instead of ten cents. The item should have been reduced to \$712.37.

The same objection is made to a charge of \$1,501 for 15,010 folios for typewritten transcript, filed with the clerk of this court. The clerk of the district court is allowed ten cents per folio for such transcripts. (Political Code, sec. 4636.) The evidence shows, however, that the principal part of the transcript was made up of copies of the evidence obtained from the stenographer, the rest being copies of the pleadings and of the findings, all prepared by a copyist employed by the defendant. The clerk was therefore not entitled to charge anything except for comparing the copy with the original and for his certificate. (Political Code, sec. 4636.) The transcript, except the copies of the evidence, cost as much as the allowance made to the clerk under the statute for his work. The number of folios thus paid for was 763, for which defendant is entitled to charge \$76.30. This item should therefore have been charged and allowed as fol-

lows: 14,247 folios, at five cents, \$712.35; 763 folios, at ten cents, \$76.30; clerk's fee for comparing and for certificate, \$5.00; making a total of \$793.65.

The specific objection made to the item of \$3,424.90 for printing the transcript was that it was excessive, unreasonable and unnecessary. The court disallowed of it \$102.50. This sum was made up of an item of \$23.40, paid for cuts used in the printing and made especially for that purpose, and the balance of \$79.10 for portions of the transcript which the court held to have been unnecessary to present the case on appeal. The evidence shows that the transcript was printed under contract, at fifty cents per page. There is no controversy but that under the evidence this was a reasonable charge; but since it was printed under contract, the contract price only should have been charged. The defendant was not entitled to add the item for cuts. The court was therefore correct in disallowing the amount paid for them. But it had no power to say that any portion of the transcript should have been omitted as unnecessary. This court is the exclusive judge, within the limitations of the statute, of what the record should contain in order to present appellant's case to it for review. It will strike out the portions of a transcript which should not be incorporated therein, and disallow the cost of its preparation to that extent (Rules 1899, Rule VII, subdivision 6; 22 Mont. xxxii; Rules 1905, Rule VII, 30 Mont. xxxv, for the statute allows only reasonable charges for it; but to permit the district court to purge the record and fix the proper charge for it, would be equivalent to allowing that court to be the judge of the extent to which this court may go in its review of the case. This could not be tolerated for a moment. If the transcript contained matter which was not necessary, the plaintiff should have presented its objections to this court. The only questions which the district court has to do with on a motion to tax the costs of the appeal after *remittitur* has been filed, are whether particular items are within the statute and whether the charge made is reasonable. The questions as to what record is neces-

sary and what papers should be filed, are exclusively for this court. The district court should not, therefore, have stricken out the item of \$79.10. Subject to a reduction by striking out the item of \$23.20, the charge for cuts, the item charged for printing is proper and must be allowed.

The court disallowed an item of \$47.25, charged for a supplemental brief filed by defendant after the appeals had been argued and submitted. For the reasons heretofore stated, this was error. This court must be its own judge as to whether any brief is necessary; and if the adverse party desires to object to the filing of a supplemental brief in this court, the objection must be presented to, and determined by, this court. There is no objection that the amount charged is not reasonable, and it must be allowed.

Of an item of \$23.90, charged for *remittitur* from this court, there was allowed \$1.80, the court holding that the plaintiff could not be charged for a copy of the opinion of this court which the clerk attached to it. In this ruling the court was also wrong. By Rule XIX of this court in force at that time and now (Rules 1899, Rule XIX, 22 Mont. xxxviii; Rules 1905, Rule XIX, 30 Mont. xlii, the requirement is that "a copy of the opinion will accompany the *remittitur* when the judgment or order of the trial court is reversed or modified." By the statute fixing the fee bill of the clerk of this court (Political Code, section 872), he is required to collect in advance fifteen cents per folio for making copies of papers or records. By the following section (873) it is his duty to make copies of papers or records when demanded by law or the rules of this court. These provisions of the statute and the rules of this court are controlling, but were evidently overlooked by the district court in disallowing part of this item so stricken out. The whole of this item must be allowed.

The order appealed from must be modified to meet the views herein stated. The matter is remanded to the district court with directions to modify the order accordingly.

Modified.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

RYAN, RESPONDENT, v. RYAN, APPELLANT.

(No. 2,199.)

(Submitted January 4, 1906. Decided January 29, 1906.)

Divorce—Extreme Cruelty—Pleadings—Complaint—Alimony.

Divorce—Extreme Cruelty—Complaint—Proof.

1. Under Civil Code, section 134, grievous bodily injury or bodily injury dangerous to life are ultimate facts which must be pleaded and proved in order to entitle plaintiff to a divorce on the ground of extreme cruelty.

Divorce—Extreme Cruelty—Complaint.

2. A complaint in an action for divorce upon the ground of extreme cruelty, in that defendant struck, beat and choked plaintiff and otherwise brutally treated her, but which omitted to allege that the acts of defendant produced grievous bodily injury or bodily injury dangerous to life (Civil Code, section 134), failed to state a cause of action. [Mr. JUSTICE MILBURN dissenting.]

Divorce—Alimony—Complaint.

3. In order to entitle plaintiff, in an action for divorce, to alimony, the complaint should set forth her necessity therefor and defendant's ability to pay it.

Appeal from District Court, Jefferson County; M. H. Parker, Judge.

ACTION by Florence E. Ryan against James Ryan. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Mr. C. R. Stranahan, for Respondent.

While it is true that it is a principle of law that the state has an interest in divorce suits, which we see exemplified in the rule that judgment for divorce cannot be taken upon default without the evidence, yet in matters of pleading the same rule applies as in pleading other facts, and even if the facts are not specifically alleged, which we do not admit in this case, the defendant waived any such defect by his failure to demur. (*Conant v. Conant*, 10 Cal. 249, 70 Am. Dec. 717.) If the charges of cruelty are vague and indefinite, the defendant must move to have the complaint made more definite and certain, for the complaint unless wholly defective, will otherwise be con-

sidered as alleging facts sufficient to constitute a cause of action. (7 Ency. of Pl. & Pr. 77, 78; 2 Estee's Pleadings, p. 294, sec. 2992.)

The complaint alleges facts from which the jury found, and were justified from the allegations of the complaint in finding, both inflictions of bodily injury dangerous to life and also repeated infliction of grievous bodily injury; and it was for the jury to find from acts set out in the complaint, which we must presume for the purpose of this appeal were substantiated by the proof, that the defendant was guilty of at least one or both forms of extreme cruelty toward the plaintiff. (*Reading v. Reading*, 96 Cal. 4, 30 Pac. 803; *Lount v. Lount*, 1 Ariz. 422, 25 Pac. 798; *Johnson v. Johnson* (Cal.), 35 Pac. 637; *Irwin v. Irwin*, 2 Okla. 180, 37 Pac. 548; 17 American Digest, Century ed., sec. 300.)

Messrs. Cowan & Cowan, and Mr. T. J. Walsh, for Appellant.

A pleading where a severance of so sacred a tie is prayed for, must clearly conform to all statutory regulations, and must contain positive allegations of fact necessary or essential to constitute the particular ground relied upon for relief. (2 Boone's Code Pleading, p. 136 (Pony Series); *Bennett v. Bennett*, 28 Cal. 600; *Green v. Palmer*, 15 Cal. 415, 76 Am. Dec. 492.) In the complaint in this case a declaration to the effect that any of the acts of defendant, specified by her, were *dangerous to life*, or created *grievous bodily injury* is lacking, and without such allegation, the complaint is insufficient to sustain the action or uphold a judgment for divorce rendered thereon.

That part of the judgment rendered in this cause, adjudging the defendant to pay permanent alimony, is not sustained by any allegation or proof in the case. A judgment for permanent alimony must be based on the proper allegation, and proof thereunder, of a *present ability to pay*. (*Washburn v. Washburn*, 9 Cal. 475; *Feigley v. Feigley*, 7 Md. 437, 61 Am.

Dec. 375; *Sheafe v. Sheafe*, 36 N. H. 155; *Eidenmuller v. Eidenmuller*, 37 Cal. 364.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to secure a divorce upon the ground of extreme cruelty. The plaintiff prevailed in the district court and the defendant appeals from the judgment.

The only question presented is: Does the complaint state a cause of action? In paragraphs 6, 7 and 8 an attempt is made to charge the defendant with extreme cruelty as defined in our Civil Code, section 134, which reads as follows: "Sec. 134. Extreme cruelty is the infliction or threat of bodily injury dangerous to life, or the repeated infliction or threat of grievous bodily injury, upon the other party, by one party to the marriage, or the repeated publication of false charges against the chastity of the wife by the husband."

The complaint does not attempt to charge the defendant with making threats of inflicting bodily injury, or of publishing false charges against the chastity of plaintiff; so that it must be tested by one of the other definitions given in that section, namely, the infliction of bodily injury dangerous to life, or the repeated infliction of grievous bodily injury. The particular acts of cruelty of which complaint is made consist of defendant's striking, beating and choking the plaintiff, throwing her violently against the side of a barn, throwing her down two steps out of their house and other like brutal acts. It is repeatedly said that these acts caused plaintiff great bodily and mental pain and suffering; but the complaint does not anywhere allege that they produced grievous bodily injury or bodily injury dangerous to plaintiff's life, and for this reason appellant contends that the complaint does not state a cause of action.

Prior to 1895 extreme cruelty was a ground for divorce, but was not defined by statute. The courts were left to frame such definitions as general usage might warrant. In 1885 this court, in *Albert v. Albert*, 5 Mont. 577, 51 Am. Rep. 86, 6 Pac. 23,

in considering an action for divorce on the ground of extreme cruelty, said: "A husband may not raise his hand against his wife, except in absolute defense of his life, or to prevent his receiving great bodily harm; and then he can only use force sufficient to protect himself from the danger." For ten years that doctrine was apparently accepted as reflecting the opinions of courts; but in 1895, in adopting section 134 of our Civil Code, the legislature, presumably with full knowledge of the rule announced in the *Albert Case*, saw fit to change entirely the policy of the law. Extreme cruelty no longer was made to represent the mere indignity suffered by the wife consequent upon her receiving from the husband a blow delivered in anger, but it became from thenceforth such measure of actual physical injury, inflicted by one party to the marriage upon the other, that thereafter it was deemed unsafe for the parties longer to live together, and therefore sufficient, in the estimation of the legislature, to warrant a divorce. While under the doctrine announced in the *Albert Case*, a single blow by the husband delivered in anger against the wife, would doubtless have been held by the courts sufficient provocation for a divorce, the legislature, being clothed with full power to say upon what terms divorces might be had, took away from the courts the authority, theretofore exercised, to define extreme cruelty, and, while leaving it in the law as a ground for the annulment of marriage, gave to it a definition which completely changed the theory which the courts had adopted. In the view of the legislature, a husband may beat or otherwise maltreat his wife, and even do so in a brutal manner, without giving rise to an action for divorce, provided only that his mistreatment does not produce grievous bodily injury and be repeated, or if it occurs but once, that it does not produce bodily injury dangerous to life.

Under the changed rule as adopted by the legislature, grievous bodily injury and bodily injury dangerous to life are made ultimate facts which must be proved, and, in order to be proved, must be pleaded. (*Smith v. Smith*, 124 Cal. 651,

57 Pac. 573.) While a violent blow might produce bodily injury, the question whether it will produce the grievous bodily injury of the statute, or bodily injury dangerous to life, is one of fact for the trial court or jury to determine from all the evidence in the case, where the question is properly presented by the pleadings.

To ask this court now to determine as a question of law that the acts complained of in this instance caused the plaintiff grievous bodily injury or bodily injury dangerous to her life, or, in other words, constitute extreme cruelty, is in effect to ask this court to repeal section 134 of the Civil Code and restore the rule of the *Albert Case*—to set aside the definition of extreme cruelty as given by the statute and substitute therefor one of the court's own. This the court cannot do. The definitions given by the statute are exclusive and binding upon the courts and litigants alike. No matter how censurable the defendant's conduct may have been in this instance, if the injuries inflicted were not grievous bodily injuries, or bodily injuries dangerous to life, they did not constitute extreme cruelty as defined by the statute; and, as the complaint does not allege that they were injuries of the character mentioned, this court cannot assume that they were.

Under either of the definitions given in section 134 above and here considered, a complaint for divorce must set forth the particular facts relied upon, and must allege that the acts enumerated produced grievous bodily injury, which was repeated in the one instance, or that they produced bodily injury dangerous to life, in the other; and failing to do either, this complaint does not state a cause of action. (12 Cyc. 668, and cases cited: 1 Nelson on Divorce and Separation, 334; 2 Bishop on Divorce, 1433; *Horne v. Horne*, 1 Tenn. Ch. 259; *Wagner v. Wagner*, 3 Penne. (Del.) 303, 51 Atl. 603.) Under our view, it is immaterial that this complaint would have been held sufficient prior to the adoption of the Codes.

The court allowed the plaintiff permanent alimony to the extent of \$50 per month until the further order of the court.

The complaint does not contain any allegations of plaintiff's necessity for alimony or of defendant's ability to pay it; and, while we are not prepared to say that alimony may not be allowed as strictly ancillary to a proceeding for divorce, we think the better practice is for the complaint to set forth the necessary facts upon which alimony may be allowed.

The judgment is reversed and the cause remanded.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE MILBURN: I dissent. I do not think that it is necessary to use the exact language of the statute in order to state in the pleading the ultimate fact to be proven. If the words used in the complaint imply and express the meaning embraced within the definition of the statute, this ought to be sufficient, in my opinion. I think that the complaint alleges that the defendant was guilty of the "repeated infliction of grievous bodily injury," although the exact words of this phrase are not employed in the pleading.

The complaint alleges, among other things, that the plaintiff "frequently abused and maltreated her, causing her great mental and bodily pain, suffering and anguish"; "frequently, while plaintiff was sick and under the doctor's care, the defendant treated and used plaintiff in a cruel and inhuman manner, the particulars of which are too indecent to be here repeated in detail"; "the defendant struck plaintiff a violent blow, and drove her with great force against the barn, * * * causing plaintiff great bodily suffering; * * * the defendant beat, bruised and choked plaintiff; * * * the defendant shoved plaintiff violently upon the floor and held her down in such position and then dragged her into another and adjoining room, where he released plaintiff; * * * and then grabbed plaintiff by the arms with such great force and violence as to cause her great bodily pain and suffering; that she screamed in agony, and that thereupon defendant, to stop her said screaming, choked her, and again threw her upon the floor, and while she was

there, held her by the neck and shoulders, dragging her with great force and violence across the room and threw her out of the house down two steps, and upon the ground with such force and violence as to bruise and wound her seriously, causing her further pain and suffering, and rendering her unable to attend to her household duties for about a week thereafter; * * * that all of the foregoing treatment of plaintiff by defendant has greatly broken her health and caused her great bodily and mental pain and suffering."

There was not any demurrer to this complaint on the ground of any ambiguity or uncertainty. The statute does not require that the injuries inflicted should be permanent; nor does it say how often the grievous bodily injuries have to be repeated. Inflicting one grievous bodily injury to-day and inflicting one to-morrow, in my opinion would constitute the repeated infliction of grievous bodily injury. "Grievous," among other things, means "painful." "Injury" also includes in its meaning a "hurt."

I am of the opinion that the above statement of facts, if proven, would, under the definition of "extreme cruelty" given in the statute and quoted in the opinion, warrant a finding that the defendant had been guilty of extreme cruelty. If a complaint in a divorce case should allege that the husband on one day had chopped off the right foot of the wife maliciously, and two days afterward had chopped off the other foot maliciously, it does not appear to me that it would be necessary for the complaint to go further and, in the exact language of the statute, charge that the defendant had inflicted bodily injury dangerous to life upon his wife. I think it would be also a sufficient allegation of infliction of "repeated grievous bodily injury." I think the complaint is sufficient.

I agree, however, with what is said in the opinion as to the matter of alimony.

Rehearing denied March 19, 1906.

RABAN, ADMINISTRATOR, RESPONDENT, v. CASCADE BANK,
APPELLANT.

(No. 2,210.)

(Submitted January 6, 1906. Decided January 31, 1906.)

*Public Administrators—Banks—Estates—Mingling of Funds—
Effect—Conversion.*

*Public Administrators—Banks—Funds of Estates—Mingling in One De-
posit—Effect.*

1. A public administrator mingled the funds derived from a number of estates in one general deposit in bank. There was nothing to indicate to the officers of the bank the source from which the moneys came. After the administrator's removal by the district court and the appointment of a special administrator for certain of the estates, the latter brought suit against the bank to recover a balance of \$2,539.02 remaining to the credit of the defaulting public administrator. The court found that this sum belonged to one certain estate. *Held*, that in so finding the court erred, since the funds, when mingled in one general deposit in the bank, lost their identity, and that it was therefore impossible for the court to say that they belonged to any particular estate.

Public Administrators—Mingling of Funds of Estates—Conversion.

2. The mingling of all funds received by a public administrator from the different estates in his charge in one general deposit in a bank, in face of the provision of section 4521 of the Political Code, requiring him to deposit such moneys with the county treasurer, who is required to keep a separate account with each estate, constitutes conversion.

Appeal from District Court, Cascade County; Sam Stephenson, Special Judge.

ACTION by George Raban, as special administrator, against the Cascade Bank of Great Falls, Montana. From a judgment in favor of plaintiff and from an order denying it a new trial, defendant appeals. Reversed.

Mr. Thomas E. Brady, for Appellant.

Mr. Ransom Cooper, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1896 F. A. Merrill was elected public administrator of

Cascade county and duly qualified and acted as such. In 1898 he was re-elected and again qualified and acted as such until the first Monday of January, 1901. During his two terms in office Merrill was appointed administrator of a large number of estates, among which were the Angers, Trattan, Chandler, Baldwin, Hawthorne, Bowers and Riley estates. He received large sums of money belonging to these estates, and, instead of depositing them with the county treasurer, he mingled the funds and deposited them all in the Cascade Bank in one general deposit to the credit of F. A. Merrill, administrator. In 1901 the district court made an investigation of Merrill's management of certain of these estates, and ascertained that he was delinquent in his accounts as such administrator, and made an order removing him and appointed the plaintiff, George Raban, special administrator of the above-named estates. About this time Merrill departed from the state, leaving in the Cascade Bank to his credit as administrator the sum of \$2,539.02. The sureties on his official bond paid to the special administrator the following sums representing Merrill's delinquency with certain of the estates of which he was administrator, as follows: For the Bowers estate, \$1,882.88; for the Hawthorne estate, \$53.24; for the Riley estate, \$671.78; and for the Baldwin estate, \$382.41, and thereupon commenced an action against Merrill in his individual capacity and also as public administrator, to recover certain of the amounts so paid to the special administrator, and caused a writ of attachment to be issued and served upon the Cascade Bank as garnishee.

Thereafter Raban, as special administrator of the Angers, Chandler and Trattan estates, commenced an action against the Cascade Bank to recover the \$2,539.02 remaining in that bank to the credit of Merrill. The complaint in this action contains three causes of action. A motion to strike, a general and a special demurrer were interposed, but all overruled, and the defendant bank answered putting in issue most of the material allegations of the complaint and setting forth some matters

by way of affirmative defense which were put in issue by reply. When the cause came on for trial, the defendant objected to the introduction of any testimony on behalf of the plaintiff, on the ground that the complaint does not state a cause of action. This objection was overruled and evidence received.

The testimony received on behalf of the plaintiff shows that Merrill had but one account with the defendant bank, and that was in the name of F. A. Merrill, administrator; that all funds which he deposited in the bank at all were deposited to the credit of this one account; that there was nothing to indicate the source from which the deposits came, and that the officers of the bank had no knowledge of the source, or whether they were private funds of Merrill or belonged to some estate or estates of which he was administrator. The evidence further shows that Merrill was constantly drawing funds from the bank upon his checks, many of which were drawn to his own order; that on June 8, 1900, he had withdrawn all moneys to his credit excepting \$2.50; that thereafter he deposited to the credit of this one account approximately \$8,350. Of this amount the evidence fairly shows that the Angers estate contributed about \$4,360, the Bowers estate about \$2,780; the Hawthorne estate about \$267, and the Baldwin estate about \$524. The evidence does not show the source of the remainder of the funds so deposited. Merrill drew from this account all but \$2,539.02, and while some of the items so drawn can be traced as charges against particular estates, a great portion of the money so drawn appears to have been for Merrill's own use and benefit. Merrill actually received from the Angers estate about \$5,620, but appears to have deposited only \$4,360 of it in the bank. As against this estate he was entitled to charge about \$240. When Merrill left the state he actually owed at least the following amounts: Bowers estate, \$1,882.88; Hawthorne estate, \$53.24; Riley estate, \$671.78; Baldwin estate, \$384.41; and the Angers estate about \$5,378, and, as said before, had to his credit in the bank \$2,539.02.

At the conclusion of plaintiff's case, defendant moved for a nonsuit on the ground that the plaintiff had failed to show that the funds to Merrill's credit in the bank belonged to either the Angers estate, the Trattan estate, or the Chandler estate. This motion was sustained as to the second and third causes of action, which relate respectively to the Chandler and the Trattan estates, and overruled as to the first cause of action, which relates to the Angers estate.

Upon the showing made as herein detailed, the court found that all the funds remaining to Merrill's credit in the bank belonged to the Angers estate, and entered judgment in favor of the plaintiff upon his first cause of action for that amount. From the judgment and an order denying it a new trial defendant bank appealed.

Many errors are assigned, but it will only be necessary to consider one. We entertain great doubt as to whether the complaint does or can be made to state a cause of action. Certainly, the allegations of the complaint, taken in connection with plaintiff's proof, show conclusively that the plaintiff ought not to recover in this action in any event, and defendant's motion for nonsuit should have been granted. As the proof offered by defendant did not tend in any manner to supply the deficiency in the plaintiff's case, the exception to the court's ruling is available here.

Section 4521 of the Political Code requires the public administrator, as administrator of any estate, to deposit all funds belonging to such estate and not required for current expenses of administration with the county treasurer, who is required to keep a separate account with each estate. When Merrill mingled all the funds received by him from the different estates, and in violation of the law deposited them in the defendant bank, he thereby converted them to his own use (*County of Pine v. Willard et al.*, 39 Minn. 125, 12 Am. St. Rep. 622, 39 N. W. 71, 1 L. R. A. 118), if he did nothing worse. (Penal Code, sec. 771.) The funds, when deposited in the bank in a general deposit, ceased to be the funds of Merrill or of any par-

ticular estate or estates, and became the funds of the bank. (5 Cyc. 514, 517, 518.) Merrill then merely had credit at the bank for whatever balance remained in his account, but the identity of the funds was lost. It was simply impossible for the court to say that the balance to Merrill's credit belonged to the Angers estate or to any other estate.

We will not determine in this action whether or not the balance remaining to Merrill's credit might be subjected to the claims of the various estates to which he was indebted, in case actions on Merrill's official bond should fail to recover sufficient to fully indemnify them, and a proper action was, or proper actions were, then instituted for that purpose.

The judgment and order are reversed and the cause is remanded.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

GREAT FALLS MEAT CO., RESPONDENT, v. JENKINS. APPELLANT.

(No. 2,201.)

(Submitted January 4, 1906. Decided January 31, 1906.)

*Contracts—Sales—Cattle—Delivery—Evidence—Exclusion—
Instructions—Appeal—Conflict in Evidence—Witnesses—
Mileage—Attachment—Costs—Appealable Orders.*

Contracts—Cattle—Delivery—Evidence.

1. The district court, in an action brought to recover damages for the breach of a contract which called for the delivery of certain beef cattle, did not commit error in not admitting evidence to show that it was the intention of the parties that delivery of the cattle should be made at the ranch of defendant, where it was apparent that the contract was so construed by the court, as evidenced by the instructions submitted, as well as by the plaintiff, who had sent agents to defendant's ranch to demand delivery there.

Instructions—Request for—Record—Appeal.

2. Where the record is silent as to what, if any, instructions were requested by appellant upon specific points in an action for breach of
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contract, he cannot complain that those submitted were not as specific as they should have been.

Appeal—Conflict in Evidence—Result.

3. The judgment of the district court will not be disturbed on appeal on the ground of insufficiency of the evidence, where a substantial conflict on material issues is shown, and where upon a re-examination of it by the trial court a new trial was refused.

Witnesses—Mileage—Costs.

4. While witnesses residing in a county other than where the trial is had, and more than thirty miles from the place where it takes place, may not be compelled to attend, under Code of Civil Procedure, section 3304, still, where they do attend and the court finds that their testimony was necessary, the successful party is entitled to include the amount paid them for mileage in his cost bill. [MR. JUSTICE HOLLO-WAY dissenting.]

Attachment—Motion to Dissolve—Appealable Orders—Costs.

5. Plaintiff, in an action for damages for breach of a contract to deliver certain beef cattle, caused an attachment to issue and to be levied upon some of the cattle. Defendant moved to dissolve the attachment, which motion was overruled. Defendant did not appeal from this order. *Held*, that owing to his failure to appeal from the order refusing to discharge an attachment—an appealable order—(Session Laws, 1899, page 146), defendant cannot be heard to complain, on appeal from the judgment, of that part of it which reimbursed plaintiff for the reasonable and necessary expense incurred by him in caring for the property.

Appeal from Judgment—Review—Appealable Orders.

6. Under Code of Civil Procedure, section 1742, the supreme court cannot, on appeal from the judgment, review an order from which an appeal could have been taken.

Appeal from District Court, Cascade County; Jere B. Leslie, Judge.

ACTION by the Great Falls Meat Company against J. W. Jenkins. Plaintiff had judgment, and from it and an order denying a new trial to defendant, he appeals. Affirmed.

Mr. Thomas E. Brady, and Mr. C. B. Nolan, for Appellant.

Messrs. Downing & Stephenson, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to recover damages for an alleged breach of a contract to deliver certain beef cattle bought by plaintiff from defendant. Under the terms of the contract as

first made on July 19, 1902, the delivery was to be made on or about October 1, 1902. This not having been done, the parties agreed that the delivery might be made at any time between October 21 and November 1, 1902. The contract and the modification of it were expressed in the following writings:

"Milligan, Mont., July 19th, 1902.

"I have this day, John W. Jenkins sold to the Great Falls Meat Co. 70 seventy 4 & 5 year old steers about $\frac{1}{2}$ each the tops of his entire bunch at 55.00 Fifty-five Dollars per head and said steers is to remain on his range till October 1st or thereabout and said J. W. Jenkins is to help deliver said cattle to Great Falls, also what good fat cows he may have at that time at \$35.00 Thirty-five Dollars per head, no old cows to go at that price. I have received \$200.00 Dollars as part payment on said cattle.

"J. W. JENKINS.

"E. S. McCARTNEY."

"Great Falls, October 21st, 1902.

"It is agreed by and between the parties to this contract that the Great Falls Meat Co. may receive said cattle described herein at any time between this date and the last day of Nov. 1902.

"J. W. JENKINS.

"GREAT FALLS MEAT CO.,

"By BROWN, Pt."

The complaint sets out a history of the dealings between the parties resulting in the contract and its modification. It is then alleged that the plaintiff went to the ranch of the defendant in Meagher county, Montana, on October 29th, and demanded the fulfillment of the contract by the defendant by a delivery of the cattle according to its terms, it being then ready and willing to pay to the defendant the amount due upon delivery; but that defendant failed and refused to deliver them under the agreement, or at all, to the damage of plaintiff in

the sum of \$1,000. It is further alleged that the plaintiff suffered special loss and damage in the sum of \$150, in that it incurred the expense of sending men from Great Falls, Cascade county, its place of business, to Meagher county to receive said cattle. Judgment is demanded for \$1,150.

The defendant admits that he entered into the contract as alleged, but denies that he was guilty of a breach thereof in any particular, or that plaintiff suffered damage or loss by reason of any act done or omitted by him. He then sets up a counterclaim for damages for a breach of the contract by the plaintiff, for that though the defendant was always ready and willing to perform it on his part according to its terms, in that he gathered the cattle upon the range and herded them during the last ten days of October, 1902, and had them ready for delivery, the plaintiff on his part refused to receive them or to pay for them, or any part of the expense incident to gathering and holding them. Judgment is demanded for the sum of \$1,000. Upon this counterclaim there was issue by reply.

A trial resulted in a verdict and judgment for plaintiff for \$250 damages and costs amounting to \$1,167.50. The costs consist mainly of expenses of keeping and feeding cattle belonging to the defendant, which were seized and held by the sheriff under attachment, caused to be issued by the plaintiff at the commencement of the action, to secure the payment of any judgment recovered. The defendant has appealed from the judgment and an order denying him a new trial.

Contention is made that the district court erred to the prejudice of the defendant in admitting and excluding evidence, in submitting to the jury certain instructions and refusing to submit others, in taxing and allowing various items of cost, and in refusing to grant a new trial on the ground that the evidence is insufficient to justify the verdict.

1. The brief of appellant contains many assignments of error upon which these contentions are made; but the record does not, in our opinion, reveal any substantial error. Some immaterial

evidence was admitted, but upon the whole case we think no harm was done by it.

The construction given by the court to the contract, as is manifested by the instructions submitted, was correct and as favorable to the defendant as he had a right to ask. Defendant contends that it is ambiguous in its terms touching the place of delivery, and insists that the court should have admitted evidence showing that it was the intention of the parties that delivery should be made at the ranch of the defendant. This contention is wholly without merit, for the court so construed the contract, and it is entirely clear that the plaintiff so understood it and acted upon it; for both under the original contract and the subsequent modification of it, the plaintiff sent agents to the ranch of the defendant and demanded delivery there, the only question in controversy being whether the defendant complied with it on his part or intended to do so. The instructions submitted therefore were correct and entirely applicable to the facts.

The record does not show what, if any, instructions were requested by the defendant upon other specific points in the case. He therefore cannot complain that the instructions submitted were not sufficiently specific.

2. As to the contention that the evidence is not sufficient to justify the verdict, it is sufficient to say that it presents a substantial conflict upon the material issues involved. Such being the case, and the district court having re-examined it and declined to grant a new trial, this court must accept its judgment thereon as conclusive. It does not appear that the trial court abused its discretion in the premises.

3. Nor do we find error committed by the court in taxing the costs. Complaint is made that the court erred in allowing mileage of two witnesses who reside in other counties than Cascade and more than thirty miles from the place of trial. Appellant invokes section 3304 of the Code of Civil Procedure, which provides: "A witness is not obliged to attend as a witness before any court, judge, or justice, or any other officer, out of the county

in which he resides, unless the distance is less than thirty miles from his place of residence to the place of trial." Contention is made that, since under this section a witness situated as were these may not be compelled to attend the trial, it follows that if they do attend, the successful party calling them may not recover the mileage paid them as a necessary disbursement in the case, but that he should have taken their depositions.

The above provision is clear and explicit in its terms and is not open to the construction contended for by appellant. Its constitutionality was doubted by this court in *McGlaulin v. Wormser*, 28 Mont. 177, 72 Pac. 428; but conceding that it is not open to this objection, it does not deal with the subject of mileage of witnesses, but clearly and explicitly and in terms extends to a witness coming within its provisions a privilege to attend or refuse at his option. He may not be compelled to attend. In that event his deposition may be taken under section 3342 of the Code of Civil Procedure. Under section 4648 of the Political Code, a witness attending a trial is entitled to his mileage going to and returning from the place of trial at the rate of ten cents per mile. There is no conflict between the latter section and the provisions of the Code of Civil Procedure, *supra*. Both are clear and explicit upon the subjects with which they deal; but if there were a conflict, the latter would prevail. (Political Code, sec. 5162.) These witnesses attended the trial. They were entitled to their mileage. Such being the case, and the court having found, as it did, that their testimony was necessary, the plaintiff was entitled to include the amount paid them in its cost bill. (*McGlaulin v. Wormser supra*.)

As stated above, the plaintiff at the commencement of the action caused an attachment to issue and to be levied upon a sufficient number of cattle of the defendant to secure his recovery. The sheriff under order of the court put a keeper in charge, and his compensation, together with the expense of feeding, was paid by the plaintiff. The contention is made that under the holding of this court in *Ancient Order of Hibernians*

v. *Sparrow et al.*, 29 Mont. 132, 101 Am. St. Rep. 563, 74 Pac. 197, 64 L. R. A. 128, the plaintiff was not entitled to an attachment in this case, and, since he was not, none of the expense incurred by the plaintiff in caring for the property can be recovered as necessary disbursements in the case. The record, however, shows that the defendant moved the court to dissolve the attachment on the ground that the plaintiff was not entitled to it. This motion was overruled. Although the defendant was entitled to an appeal from this order (Code of Civil Procedure, section 1722, as amended by Act of 1899, Session Laws, 1899, page 146), he prosecuted no appeal, but submitted to the order of the court as made. Section 1742 of the Code of Civil Procedure provides that, upon appeal from a judgment, the court may review the verdict or decision and any intermediate order or decision, excepted to, which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken. Under this provision this court has no power to review the action of the court upon the motion to dissolve the attachment, because, being an appealable order, it cannot be reviewed on appeal from the judgment. Since the defendant submitted to the ruling of the court and took no appeal, he cannot now complain that all the consequences flowed from it that would have resulted from an order correctly made. Under the circumstances, we think the court was clearly correct in taxing all costs incident to the attachment proceeding, subject to the provisions of section 1866 of the Code of Civil Procedure, which limit the allowance to such disbursements only as are reasonable and necessary.

Let the judgment and order be affirmed.

Affirmed.

MR. JUSTICE MILBURN concurs.

MR. JUSTICE HOLLOWAY: I agree with all that is said except in the first portion of paragraph 3 of the opinion.

If section 3304 of the Code of Civil Procedure is constitutional, then I am of the opinion the district court erred in allowing the prevailing party to recover for mileage paid the witnesses Mongar and Paradis. Those witnesses were not obliged to attend the trial if that section is valid, and if it was not necessary for them to do so, their mileage was not an expense necessarily incurred, and, if not, the plaintiff could not recover it.

In order to recover any particular item as costs the party claiming the same is required to swear that such item was necessarily incurred. (Code of Civil Proc., sec. 1867.) It seems to me impossible for the plaintiff in this instance to make that affidavit respecting this mileage which section 3304 above specifically provides need not be incurred. (*Mylius v. St. Louis F. S. & W. R. R. Co.*, 31 Kan. 232, 1 Pac. 619.)

The question of the validity of section 3304 above was not presented. While I entertain great doubt as to the validity of the section, I think the court erred if this section should be held to be valid.

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ROSENBAUM BROS. & CO., RESPONDENT, v. RYAN BROS. CATTLE CO., DEFENDANT; THE FIRST NATIONAL BANK OF LEAVENWORTH, KANSAS, INTERVENER AND APPELLANT.

(No. 2,207.)

(Submitted January 5, 1906. Decided February 10, 1906.)

Chattel Mortgages—Affidavits of Renewal—Liens—Foreclosure—Appeal—Statutory Construction.

Appeal—Reversal—Erroneous Reasons for Correct Conclusion.

1. If correct, the conclusion of a district court will not be disturbed on appeal even though its reasons in arriving at it were erroneous.

Chattel Mortgages—Renewal—Affidavits—Statutes.

2. The statute relative to the renewal and extension of a chattel mortgage by means of an affidavit executed and filed by the mort-

gages (Civil Code, section 3866) must be strictly followed in order to acquire any right under it.

Same—Sufficiency of Affidavit of Renewal.

3. *Quære*: Is an affidavit of renewal of a chattel mortgage sufficient, which alleges (with respect to the provision of the Civil Code, section 3866, that it must state the amount of the debt justly owing at the time of the filing of the affidavit or the conditions of the obligation unfulfilled), that the promissory notes and interest thereon are wholly unpaid, and which fails to state the time to which the mortgage is extended, but only the time to which the payment of the debt is extended?

Same—Mortgage Liens—Statutory Construction.

4. *Held*, under Civil Code, sections 3865, 3866 and 3867, that the time fixed in an affidavit of renewal of a chattel mortgage marks the utmost limit of the life of the mortgage lien as against attaching creditors of the mortgagor, and the sixty days of grace mentioned in section 3865 have reference only to such period of time from the maturity of the debt as fixed at the execution of the mortgage, and not to any such period after the maturity of the debt as fixed by some subsequent agreement of the parties to the mortgage.

Appeal from District Court, Yellowstone County; C. H. Loud, Judge.

ACTION by Rosenbaum Bros. & Co. against Ryan Bros. Cattle Company, in which the First National Bank of Leavenworth, Kansas, intervened. From a judgment for plaintiff, intervener appeals. Affirmed.

Messrs. Blackford & Blackford, for Appellant.

Mr. W. M. Johnston, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On March 19, 1902, Ryan Bros. Cattle Company, a corporation, executed and delivered to the First National Bank of Leavenworth, Kansas, its four promissory notes aggregating in amount \$115,000, due 120 days after date, with interest at eight per cent per annum, and, to secure the payment of the same, executed a certain chattel mortgage upon personal property in Montana. The mortgage or a copy of the same was filed in the respective offices of the county clerks of Fergus, Yellowstone, and Rosebud counties. On July 11, 1902, the

president of the First National Bank, mortgagee, executed, and filed in the office of each of said county clerks, what was evidently intended as an affidavit of renewal of the chattel mortgage. That affidavit, which is hereafter referred to as exhibit B, gives the date of the mortgage, the names of mortgagor and mortgagee, the date of the filing of the mortgage, the amount of the debt secured thereby, and contains the necessary declaration of good faith. It also states that the whole amount of principal and interest is unpaid, and that the payment of said indebtedness is extended four months from July 19, 1902.

On January 15, 1903, the mortgagee commenced an action in the district court of Fergus county to foreclose the chattel mortgage, and immediately thereafter filed in the office of the respective county clerks of Fergus, Yellowstone, and Rosebud counties a notice of *lis pendens*. On January 23, 1903, a like action was commenced and a like notice filed in Yellowstone county; and on January 29th like proceedings were had in Rosebud county. On April 24, 1903, Rosenbaum Bros. & Co., a corporation, having commenced an action in the district court of Yellowstone county against Ryan Bros. Cattle Company, the mortgagor above named, caused writs of attachment to be issued in said action and to be levied upon the property described in the mortgage, the levy being made in each of the counties above mentioned, pursuant to the provisions of section 940 of the Code of Civil Procedure. On July 23, 1903, by permission of the district court of Yellowstone county, and by stipulation filed in the case of *Rosenbaum Bros. & Co. v. Ryan Bros. Cattle Company*, the First National Bank of Leavenworth filed a complaint in intervention, the purpose of which was to have it decreed that the lien of the bank by virtue of its chattel mortgage was prior and superior to the attachment lien of plaintiff, Rosenbaum Bros. & Co.

The complaint in intervention recites the history of the execution of the notes, chattel mortgage, and the so-called affidavit of renewal, and the commencement of the actions and the proceedings had therein, as above detailed. Respecting the so-

called affidavit of renewal and the extension of the time of the maturity of the debt, the complaint in intervention alleges that: "A. Caldwell, then the president of the said First National Bank of Leavenworth, Kan., this intervener, and for and on behalf of this intervener as mortgagee in the aforesaid chattel mortgage mentioned, for the purpose of carrying out an agreement between the said defendant, the Ryan Bros. Cattle Company, and the said intervener, made an affidavit in writing, pursuant to section 3866 of the Civil Code of the state of Montana, wherein and whereby the said intervener extended the time for the payment of the aforesaid promissory notes, and each of them, four months from the date of the maturity thereof, to-wit, four months from the 19th day of July, 1902, and also renewed the said chattel mortgage securing said promissory notes for said time, * * * a copy of which said affidavit as aforesaid is hereunto annexed marked exhibit B and made a part of this complaint." To this complaint in intervention the plaintiff, Rosenbaum Bros. & Co., filed a general demurrer, which was overruled, and then an answer putting in issue practically all the material allegations of the complaint in intervention, and setting forth some affirmative matters which were denied in a reply.

In support of its complaint in intervention the intervener offered its evidence, a portion of which was excluded by the trial court, the court thereby practically reversing its former ruling on the general demurrer, and in effect holding that the complaint in intervention does not state facts sufficient to constitute a cause of action; then found the issues for the plaintiff Rosenbaum Bros. & Co., and entered a decree that the intervener take nothing by the action. From this decree and an order overruling its motion for a new trial, the intervener appealed.

It is not contended that the intervener has a lien prior and superior to plaintiff's, unless its action to foreclose was commenced during the period of time in which its mortgage was a valid lien upon the property as against attaching creditors.

The debt secured by the chattel mortgage matured on July 17, 1902, and the chattel mortgage continued in full force and effect for sixty days thereafter, or until September 16th. The intervener's action to foreclose was not commenced until January 15, 1903; but appellant contends that by agreement between the mortgagor and mortgagee the date of maturity of the debt secured was extended for four months, as provided in section 3867 of the Civil Code, that the mortgage was renewed or extended for a like period from July 17th by virtue of the affidavit (Exhibit B above), and that the action to foreclose was in fact commenced within sixty days after the expiration of the period to which the debt and mortgage were thus extended. The district court held that the so-called affidavit of renewal (Exhibit B above) was ineffectual for the purpose of extending or renewing the chattel mortgage so as to constitute it a lien superior to the attachment lien of the plaintiff, and gave its reasons for so concluding. This holding of the court is attacked here; but we are only called upon to determine whether the court's conclusion was correct; for, if so, it will not be disturbed even though the court may have given erroneous reasons therefor. This rule was adopted many years ago by this court and has been uniformly adhered to since.

We may, then, consider only the one question: Did the affidavit (Exhibit B above) work an extension of the chattel mortgage so as to continue the lien thereof as against the attaching creditor? It will be conceded that, as against attaching creditors, the lien of the chattel mortgage expired on September 15, 1902, unless extended by this affidavit or agreement. Section 3866 of the Civil Code provides for the renewal or extension of a chattel mortgage by means of an affidavit, executed and filed by the mortgagee; but, as the right thereby acquired is purely a statutory one, the statute must be strictly followed. That statute enumerates seven provisions to be embodied in the affidavit, every one of which is indispensable to the efficiency of the affidavit for the purpose of extending the mortgage. An examination of Exhibit B above will show that it meets the requirement

of this statute in respect to provisions 1, 2, 3, 4, and 7. With respect to provision No. 5 it alleges that the promissory notes as well as the interest thereon are wholly unpaid. Whether this is a sufficient compliance it is not necessary now to determine. With respect to provision No. 6, the affidavit does not state the time to which the mortgage is extended but only the date to which the time for payment of the debt is extended. We entertain a doubt as to whether the affidavit is sufficient for the purpose intended. However, it is drawn in conformity with the opinion of this court in *Cope v. Minnesota T. F. Co.*, 21 Mont. 18, 52 Pac. 617; and, as section 3866 has been materially amended since the decision in that case was rendered and since the affidavit in this instance was drawn, it is not necessary to consider this question further. Doubtless it will not arise again.

The more serious question is presented with respect to the effect of the agreement between the mortgagor and mortgagee to extend the time for the payment of the debt secured by the mortgage, as set forth in that portion of the complaint quoted above.

Section 3865 of the Civil Code provides that every chattel mortgage made, acknowledged and filed as provided by law, is thereupon, if made in good faith, good and valid as against creditors of the mortgagor from the time it is so filed until maturity of the debt, and for sixty days thereafter; provided, the entire period does not exceed one year and sixty days, except by a compliance with the provisions of section 3866.

Section 3866 provides for the renewal of a chattel mortgage by an affidavit, made and filed by the mortgagee, and when such proper affidavit is so filed and proper entry is made by the county clerk, such mortgage is renewed and continues and is valid and of full force and effect upon the personal property described in the mortgage, *for the time stated in such affidavit*, not to exceed one year.

Section 3867 provides that the extension of the chattel mortgage effected by the affidavit mentioned in the preceding section, shall not work any extension of time for the maturity of the

debt, but the same may be enforced according to the conditions of the mortgage and an action to foreclose the same maintained, at any time within the period covered by such renewal, unless there is an agreement between the mortgagor and mortgagee to extend the time of payment of the debt to the time stated in the affidavit.

When section 3865 provides that a chattel mortgage is valid against creditors of the mortgagor until maturity of the debt and for sixty days thereafter, does it mean for sixty days after the maturity of the debt as fixed in the mortgage, or for sixty days after the maturity of the debt as fixed by some subsequent agreement of the parties? Appellant earnestly contends that it had sixty days after November 17, 1902, within which to commence its action to foreclose, and this contention is based upon the proposition that, as the maturity of the debt was extended by agreement of the mortgagor and mortgagee to November 17th, the mortgage was thereupon constituted a valid lien upon the property described, for sixty days after such date. But, when sections 3865, 3866, and 3867 are considered together, we are clearly of the opinion that the sixty days of grace mentioned in section 3865 has reference only to the period of sixty days from the maturity of the debt as fixed at the time of the execution of the mortgage. Section 3867 does not assume to create a new right. It only assumes to limit or explain the effect of the renewal of the mortgage as provided in section 3866.

If, as alleged in the complaint in intervention, an agreement was entered into by the mortgagor and mortgagee in this instance, for the extension of the time for payment of the debt to November 17, 1902, the only effect of such an agreement was to prevent the mortgagee from maintaining an action to foreclose such mortgage prior to that date. Such agreement could not in any manner affect the lien of the mortgage. The provisions of section 3866 are exclusive. The mortgage could only be extended by filing the affidavit provided by that section. The time to which it is to be extended must be stated. That time is fixed by the affidavit and marks the utmost limit for the operation of

the mortgage as against the claims of attaching creditors. Assuming, for the purpose of this case, that the affidavit is sufficient to effect the extension of the mortgage to November 17, 1902, that date marks the limit of the life of the mortgage as against attaching creditors, and after that date such mortgage ceased to operate as against the claim of the plaintiff, Rosenbaum Bros. & Co.

No error appearing, the judgment and order denying appellant a new trial are affirmed.

Affirmed. ●

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

IN RE CARLETON.

(No. 2,257.)

(Submitted January 29, 1906. Decided February 10, 1906.)

Attorneys—Disbarment—Acting as Counsel for Both Parties—Deceiving Court—"Fair Trial" Law—Bias and Prejudice of District Court—False Affidavit of Disqualification—Counsel Fees—Alimony.

Attorneys—Unprofessional Conduct—Acting as Counsel for Both Parties—Deceit.

1. C., an attorney, acted in his official capacity for a woman in bringing about her marriage to her seducer. Five days later an agreement was entered into between both in the attorney's office to have the marriage annulled for monetary considerations. Soon thereafter the suit for the annulment of the marriage was commenced by the same attorney, appearing for the husband. Prior thereto the attorney had obtained a paper from the wife, executed in blank, purporting to be a designation of an attorney to represent her in the annulment proceedings. The name of an attorney was inserted in the blank by C. Neither the agreement to have the marriage annulled nor the circumstances under which the marriage was brought about, were called to the attention of the court by C. *Held*, that C.'s conduct was unprofessional and contrary to the principles of fair dealing, in that he acted as attorney for both parties in the same cause, and deceived the court in not acquainting it with all the facts connected with the case.

Attorneys—Disqualification of Judge—False Affidavit.

2. An attorney, employed by a woman in a divorce proceeding, who, in order to delay the trial of the cause, mailed to his client an affidavit or disqualification charging bias and prejudice on the part of the district judge (Laws 1903, Second Extra. Session, p. 9), to be signed by her if she saw fit to do so, where it did not appear that either the attorney or the client thought that the judge was so prejudiced, was guilty of unprofessional conduct.

Attorneys—Divorce—Alimony—Counsel Fees—Unprofessional Conduct.

3. The conduct of an attorney who entered into a contract with his client, in a divorce proceeding, whereby he was to receive, in addition to the attorney's fee that might be allowed him by the court, a portion of all moneys received by the client as alimony, and who failed to call such agreement to the court's attention, prior to the making of the order allowing counsel fees, is reprehensible, and in violation of his duty as a member of the bar.

APPLICATION by the Helena Bar Association for the disbarment of Evans A. Carleton. Judgment of suspension.

Mr. William T. Pigott, for the Accused.

Before judgment of disbarment or suspension can properly be made, the evidence to sustain the charges should be of such a character as that it satisfies the court to a reasonable certainty that the charges are true. It must appear to a reasonable certainty that the person sought to be removed or suspended has been guilty of acts involving such moral turpitude as proves his unfitness to remain a member of the legal profession. Such is the reasonable and just doctrine of this court. It is also the rule in this jurisdiction that an attorney cannot be disbarred or suspended for any cause not enumerated in the statute, and so the rule is in many other states. (*In re Collins*, 147 Cal. 8, 81 Pac. 220.) Mere irregularities, or violations of ethics not amounting to acts denounced by the statute, are not causes for disbarment or suspension. It must appear to the satisfaction of the court that the accused has committed one or more of the acts prohibited by the statute and that he is no longer fit to practice law. The first condition may of itself establish the second; on the contrary, not always does proof of the first show that an attorney is not entitled to the confidence of the court, his fellow-practitioners, and his clients. (See *State v. Baum*, 14 Mont. 14, 35 Pac. 108; *State v. Wines and Booth*,

21 Mont. 464, 54 Pac. 562; *In re Thresher*, 29 Mont. 16, 73 Pac. 1109; *In re Collins*, 147 Cal. 8, 81 Pac. 220; *Matter of Haymond*, 121 Cal. 388, 53 Pac. 899; *State v. Finley*, 30 Fla. 325, 11 South. 674, 18 L. R. A. 401; *Ex parte Eastham* (Or.), 80 Pac. 1057; *In re Cobb*, 84 Cal. 550, 24 Pac. 293; 3 Am. & Eng. Ency. of Law, 2d ed., 303, and notes; *Hinckley v. Krug* (Cal.), 34 Pac. 118; *People v. Goddard*, 11 Colo. 259, 18 Pac. 338; *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646; *Ex parte Aaron Burr*, 9 Wheat. 529, 6 L. Ed. 152; *Bradley v. Tockman*, 1 Hayw. & H. 263, Fed. Cas. No. 1788.)

Mr. Frank W. Mettler, for Complainant.

MR. JUSTICE MILBURN delivered the opinion of the court.

On the 27th day of November, 1905, certain members of the Helena Bar Association represented to this court in writing that Evans A. Carleton, an attorney and counselor at law licensed to practice his profession, had been guilty of certain acts involving moral turpitude, and asking that he be required to show cause why he should not be removed or suspended as an attorney and counselor at law and member of the bar of this state.

The accusations of which we are called upon to take notice and referred to in the communication of the gentlemen aforesaid are supported by the several oaths of Lola Ellen Heardt and Martha Smith. Mr. Carleton, after certain preliminary motions were disposed of, was ordered on the fifth day of December, 1905, to appear and show cause why he should not be disbarred or suspended as suggested. Mr. F. W. Mettler appeared as attorney for the accusers, and Mr. William T. Pigott as attorney for Mr. Carleton.

The accusations, stated as briefly as may be, are set forth in the brief of counsel for the accusers as follows:

"1. Acting as attorney for both parties in the same matter at the same time in the case of *Smith v. Smith*.

"2. Deceiving the court and also his client, Mrs. Smith, in securing and using the designation of attorney in the same case.

"3. Deceiving the court in the matter of the collusive agreement between the Smiths.

"4. Attempting to procure from his client, Mrs. Heardt, for an improper and unwarranted purpose, a false affidavit of disqualification against Judge Clements in the case of Heardt v. Heardt.

"5. Deceiving the court in the matter of the contract for attorney's fees with his client, Mrs. Heardt, in the same case."

We shall consider the first, second and third points together. It appears that the plaintiff, Mrs. Smith, before an alleged marriage between her and the defendant, James Smith, was named Martha Lee, being a young woman about eighteen years of age; that while enceinte she called upon Mr. Carleton, as a lawyer, for advice, stating that Smith was responsible for her condition. She desired that some arrangement be made by which the child, when born, would be born without the stigma of bastardy. The outcome of her consultation was that Mr. Carleton requested the defendant, James Smith, to call upon him at his office. He did so, and in the presence of the young woman and her mother he was prevailed upon to agree to a marriage ceremony, which was immediately gone through with, the understanding being, with full knowledge of counsel, that the parties were not to live together as man and wife, or in any wise enter into any marriage relation such as is contemplated in law in the case of a marriage. Five days thereafter, in Mr. Carleton's office and acting under his advice, the young man and woman entered into a written agreement, signed by each, wherein it was stated that they were both desirous of having said marriage declared null and void, the man agreeing to pay \$100 to the woman, and also to pay for her use, at the law office of Mr. Carleton, the sum of \$25 on or before the first day of each and every month thereafter, beginning on the first day of October, 1905, until the full sum of \$750 should be paid, including the \$100 before mentioned. The man agreed, upon the due performance of the

terms and agreements, not to visit or annoy the woman, and the woman agreed, in consideration of the premises set out in the contract, that she would save the man "free and blameless and without any liability whatsoever for or on account of said marriage now subsisting between said parties."

The suit to annul the marriage was soon thereafter brought, Mr. Carleton appearing for the plaintiff, Mr. Smith. Mr. Carleton presented to Mrs. Smith a document purporting to be a designation of an attorney to represent her in the annulment proceedings, leaving the place for the name of the attorney blank, which paper she signed and executed. Thereafter the name of Theodore Shed, now deceased, and then a member of our bar, was inserted by Mr. Carleton. It does not appear that Mr. Carleton, when the matter came on for hearing, informed the district court of any of the facts as to this agreement between the Smiths with relation to the marriage ceremony, but it does appear that he did not inform the court as to the agreement in writing to have the pretended marriage annulled.

Mr. Carleton in his answer admits that in August, 1905, he acted as attorney and counsel "during a short period of time" for said Martha; says that "after he had ceased to act as such attorney and counsel, and after such relations between said Martha and himself had ended, he acted as attorney for said James Smith in a suit brought for the purpose of obtaining a dissolution or annulment of the marriage, * * * and avers that when he acted as attorney for said James he was not the attorney or counsel of or for said Martha, * * *" but "that said Martha was represented by an attorney and counselor of the bar of this court, to-wit, one Theodore Shed, * * *" that the said marriage was brought about for the sole reason that said Martha was at the time of the celebration thereof heavy with child by the said James, and that the said Martha desired the ceremony performed for the sole purpose "of giving to her unborn child by said James a name and to make it legitimate," and so expressed to the accused her wish and desire at the time she engaged his services as adviser, said James and

said Martha stating at the time to the accused that "neither would live with the other and that both desired to be separated and live apart, the one from the other." He admits the making of the paper designated as an appointment of counsel, and states that "the said Martha Smith, of her own free will and accord, did sign and execute a 'certain paper purporting to be the appointment of an attorney in the proposed case of *Smith v. Smith*,' and avers that said paper writing so signed by her was a designation and appointment of an attorney to appear for her in said case, and that the attorney so appointed did appear in said case and acted therein as the attorney for said Martha Smith." He avers that the same proceedings were had and the same results secured that would have been secured if the accused, instead of another attorney, had represented said Martha in said suit. He admits drafting the agreement hereinbefore referred to, and that the said Smiths signed and executed the same.

As to the fourth and fifth specifications, in the case of *Heardt v. Heardt*, it appears that she had brought a suit for a divorce from her husband, making charges of cruelty and other things, and that she was unable to prove the charges in her complaint, and had frequently stated to her counsel that "the hand of every man was against her," and that Mr. Carleton prepared an affidavit of bias and prejudice under what is called the Fair Trial Law, and sent it to her by mail, stating that if she felt warranted in signing the same, it would, upon filing, operate to procure a continuance on account of the time required to procure another district judge to try the suit, and thus, at the end of twelve months, which meanwhile would run, she would be able to substantiate the charges of a supplemental complaint to the effect that her husband was guilty of desertion. This affidavit she failed to sign, but sent the same to the Hon. J. M. Clements, district judge.

It appears, also, that Mr. Carleton, on August 31, 1904, had entered into a contract in writing with Mrs. Heardt whereby he was to receive one-half of all moneys "received of Frank B.

Heardt in the litigation between the said Lola Ellen Hardt and her husband, Frank B. Hardt, whether the same are received as alimony or otherwise." On January 10, 1905, this agreement was modified to the effect that he was to receive one-fourth instead of one-half. On August 6th an order was issued out of the district court, directing Frank B. Hardt to appear and show cause why the plaintiff should not receive \$60 a month alimony, \$50 suit money, and \$150 attorney's fees. Hearing was continued until August 16th. On hearing, the motion for alimony was denied. On rehearing, on September 28, the court made an order that the defendant Hardt pay \$50 attorney's fees, and \$50 a month temporary alimony. It appears conclusively that counsel did not inform the court of this agreement whereby he was to receive in addition to the attorney's fee allowed by the court, a further compensation, to-wit, the amount agreed upon between him and the plaintiff as per agreement heretofore mentioned. All of these charges as to the Hardt matter are admitted by the accused.

Practically, all the points set out in the accusation as to his conduct in his relation to the Smiths and in reference to the Hardts are admitted by Carleton in his answer. A judgment might have been rendered by this court upon the answer, without taking testimony; but, it having been deemed wiser to examine the witnesses offered by the accusers, as well as to give Mr. Carleton an opportunity to make further statements in his behalf regarding his conduct, the hearing was ordered. Practically, there was not anything of importance disclosed in the evidence adduced which is not admitted in the answer.

As to the Smith matter, Mr. Carleton is of the opinion that he was not acting for both parties in the same matter at the same time. He denies that he deceived the court or his client, Mrs. Smith, in securing and using the designation of attorney in the same case; or that he deceived the court as to the matter of the agreement between the Smiths, whereby they undertook to have the alleged marriage set aside. He also denies, in the Hardt matter, that he attempted to procure any false affidavit of dis-

qualification against Judge Clements, or that he deceived the court in the matter of the contract for attorney's fees.

We do not think there is any escape, under the admissions of the accused, from holding that he did act as attorney for both parties in the *Smith Case*. When Mrs. Smith first appeared in his office and asked for advice, it appears that he outlined to her the very course of action which was pursued. He at every step therein was actively engaged in attempting to bring about the result desired, to-wit, a marriage, pretended to be for the purpose of wedlock under the laws of the state, and which, as there is some evidence to show, the man Smith was induced to consent to by threats then and there made that he would be punished for some crime not explained to him, Mr. Carleton, at the same time, intending to bring an action for annulment of the alleged marriage. All of which conduct was, at least, against good morals.

So far as any designation of attorney—an instrument to be used for the purpose of procuring the services of some unselected attorney—is concerned, that appears to be merely a part of the same plan which he had instituted; but it does not appear that in this he deceived Mrs. Smith or Mr. Smith. It may easily be supposed that each, being under his influence, signed any paper that he prepared without any question and with full acquiescence in his acts and suggestions. We believe it to be unprofessional and contrary to the principles of professional fair dealing expected at the hands of all counsel by the court, to bring an action of the kind which was brought for the annulment of such a marriage entered into under such circumstances, and especially without letting the chancellor know the full facts in the case as to how the alleged marriage was brought about, and all the circumstances pertaining thereto. Counsel should tell the court the truth, and all the truth under the official oath of the profession.

As to the Heardt matter, Mr. Carleton must have known that the so-called Fair Trial Law was not intended—whatever intentions the legislature may have had in enacting it—to aid unfor-

tunate married women to delay their divorce suits until some then nonexistent cause of action may accrue, knowing, as Mr. Carleton must have known, that a client, especially an ignorant one, such as this woman appeared on the witness-stand to be, is apt to sign and verify any paper prepared by intelligent counsel; and he was derelict in sending such an affidavit to the woman to be sworn to by her. It was his good fortune, as well as hers, that she did not make oath to it; for it does not appear for a moment that Judge Clements was disqualified by reason of bias and prejudice, or that either the accused or Mrs. Heardt thought so.

As to the contract for attorney's fees to be awarded by the court and additional compensation to be obtained by dividing with the woman the alimony to be paid by the husband, it seems that the accused relies upon what he considers somewhat of a custom among attorneys. Such custom was not proven, and if it had been, it should not operate for his benefit. There seems to be a notion among some lawyers that the property of the husband in a divorce case belongs to the judge of the court, and that he may give so much thereof as he may see fit to the wife, and that the husband may not complain. The fact is that the money to be paid out belongs to the husband, and is only taken from him by the court by force because of the necessities of the wife, and not because of any need of the attorney. A man may have his property taken only by due process of law, and when, say \$500, is allowed to a wife because she believes that she is in need and so swears, and because it is the husband's duty to take care of her *pendente lite*, certainly it amounts to almost a crime, if not quite so, to procure that sum from the husband, he and the court being deceived by the testimony of the wife and argument of counsel into the belief that she needs it for her own support, when in fact she intends to give one-half or one-fourth to the counsel to supplement the fee which the court said was right and proper to be paid by the husband to him. No self-respecting court, if it knew the facts, would make an order for \$500 for the needs of the wife if in fact she needed only half that

amount, the other half to go to the attorney in the case, in addition to a just fee fixed by the court.

There is not any occasion to hunt through the books for authorities to support this court in its conclusion that the conduct of Mr. Carleton in connection with the Smith and Heardt matters, so far as we have heretofore found, was reprehensible and in violation of his duty as a member of the bar of this court, in that he was guilty of deceit and malpractice involving moral turpitude (subsection 5, section 402, Code of Civil Procedure, amended by Session Laws, 1903, page 51). He has been guilty of such unprofessional conduct that we cannot overlook it. He is to be commended, however, for not having testified falsely in his own behalf on the witness-stand, and further for the reason that he has admitted in his answer the truth of the charges which we have found to be substantiated.

Without further comment, which would be unnecessary, the judgment of the court is, in the light of the findings and our conclusion above, that Mr. Evans A. Carleton, now a member of the bar of this court, be suspended as attorney and counselor for a period of three months from this date. At the expiration of this time said Carleton may resume the practice of law as heretofore.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

IN RE THRESHER.

(No. 2,260.)

(Submitted January 24, 1906. Decided February 10, 1906.)

*Attorneys—Disbarment—Forgery—Supreme Court—Jurisdiction—Crimes and Misdemeanors—Deceit—Evidence.***Attorneys—Disbarment—Forgery—Evidence.**

1. To warrant a finding against the accused in a disbarment proceeding, on a charge of forgery of an undertaking on attachment, the evidence must be clear and definite.

Same—Supreme Court—Jurisdiction—Crimes and Misdemeanors.

2. The supreme court has exclusive jurisdiction in a disbarment proceeding to hear the evidence and determine the truth of charges of crimes and misdemeanors involving moral turpitude, whether committed within this jurisdiction or not, and whether within or without the sphere of official duty.

Same—Crimes Falling Without Sphere of Official Duty.

3. Where the crime charged against an attorney, in a disbarment proceeding, falls clearly without the sphere of official duty, it is discretionary with the supreme court to hear and determine it upon the merits prior to a criminal prosecution and conviction in the proper court.

Same—When Supreme Court Will not Take Jurisdiction.

4. The supreme court will refuse to entertain an accusation against an attorney in a disbarment proceeding, where the crime charged falls clearly without the sphere of official duty, unless urgent reasons are shown why it should do so.

Same—District Courts—Criminal Proceedings.

5. Where the conduct charged as ground for the disbarment of an attorney falls within the sphere of official duty, the supreme court will hear and determine the matter, regardless of the fact that it amounts to an offense against the criminal laws of the state, and will not wait to inquire whether criminal proceedings have been instituted and prosecuted to a conclusion.

Same—Disbarment—Nature of Proceeding.

6. A proceeding in disbarment is in no sense a criminal investigation, but its purpose is to ascertain whether the accused attorney is worthy of confidence and possessed of that good moral character which is a condition precedent to the privilege of practicing law and of continuing in the practice thereof.

Same—Forgery.

7. An attorney into whose hands a check for \$49.60, payable to a justice of the peace, had been placed by a client to cover the expenses of an appeal from a justice of the peace to the district court, and who thereupon, forging the indorsement of the justice, obtained the money and appropriated it to his own use, the client thus failing to secure the appeal, is unworthy of confidence and guilty of conduct which merits disbarment.

Same—Deceit.

8. An attorney who, after securing an order of court to that effect, withdrew the sum of \$414.90 deposited by a client with a clerk of court as a tender, after final disposition of the action by the supreme court adverse to his client, and who thereafter, in reply to inquiries by the client, repeatedly stated that the money was still in the hands of the clerk, where it should remain until the end of the litigation, so as to keep the tender good, notwithstanding the funds had long been misappropriated by him, and, who under pretense that he was still conducting the litigation in her behalf, obtained the additional sum of \$65 at various times as court fees and expenses, should be disbarred.

APPLICATION for the disbarment of B. S. Thresher. Judgment of disbarment.

Mr. Jesse B. Roote, for Complainant.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This proceeding was instituted in this court by one G. R. Nickey, under subdivision 5 of section 402 of the Code of Civil Procedure, as amended by the Act of 1903 (Session Laws, 1903, page 51), to obtain a judgment of disbarment against B. S. Thresher, a member of the bar of Montana.

The amended accusation, duly verified by persons cognizant of the facts stated therein, sets forth, in four separate counts against the accused, acts of deceit and malpractice, and crimes involving moral turpitude, of which it is alleged the accused has been guilty in connection with his office as an attorney. The accused having failed to appear at the time set for answer, the matter was set for hearing of the evidence on the merits on January 24, 1906. On that day the accused caused to be filed written objections to the first and second counts, and denials of the third and fourth, but was not present in person nor represented by counsel; nor did he signify any purpose or wish to contest the charges or express any desire for delay in order that he might prepare his defense. Indeed, from affidavits filed at the time, it appears that the accused was attending to his ordinary duties in the courts of Silver Bow county, and seemed indifferent as to whether or not the court proceeded to the hearing

or as to what the result might be. The court considered and overruled the objections to the first and second counts, and thereupon proceeded to hear the evidence, as if denials had been interposed to all of them. No evidence was introduced in support of the first count and it was, by permission of the court, withdrawn.

The evidence in support of the second count, which charges the forging of an undertaking on attachment in an action in the district court of Silver Bow county, is not so clear and definite as to justify a finding thereon against the accused. For this reason notice of it will be omitted and the merits of the controversy will be determined by a consideration of the evidence in support of the third and fourth counts only.

The third count alleges, in substance, that on February 29, 1904, an action was begun before George F. Danzer, one of the justices of the peace in and for Meaderville township, Silver Bow county, by one W. J. Christie against G. R. Nickey, the accuser, and others, to recover judgment for \$38.50 for services performed by plaintiff for defendants; that upon a trial the plaintiff had verdict and judgment for \$35 and costs, taxed at \$12.50; that B. S. Thresher was attorney for defendants; that on March 25th, G. R. Nickey instructed him to take an appeal to the district court; that he delivered to him, the said Thresher, a check, drawn by himself on the First National Bank of Butte, for the sum of \$49.60, payable to said justice of the peace or his order, the amount called for thereby to be deposited with the said justice in lieu of an undertaking on appeal; that said Thresher, as his attorney, accepted the check and promised to deliver it to the justice for the purpose aforesaid and take the appeal, but that, instead of delivering it to the justice, as he undertook to do, on March 26th, the following day, he forged the indorsement of said justice thereon and thereby fraudulently procured the amount of money called for and appropriated it to his own use.

In substance, the fourth count alleges that on June 3, 1897, an action was commenced in the district court of Silver Bow

county by one Ruth A. Burton, plaintiff, against one Henry Kipp, defendant; that during the pendency of said action and prior to May 14, 1904, there had been deposited in the district court by Ruth A. Burton the sum of \$400 in cash as a tender to the defendant in the action; that the court on May 14, 1904, made an order directing the treasurer of Silver Bow county, with whom the money had been deposited by the clerk of the court as required by law, to pay over to the clerk the said sum of \$400, and further, that the clerk pay the same to Ruth A. Burton or to either of her attorneys, J. J. McHatton or B. S. Thresher; that on the same day B. S. Thresher received the said amount from the clerk, and thereupon, disregarding his duties in the premises and intending to cheat and defraud said Ruth A. Burton, appropriated said amount to his own use; that, though repeated demand has been made upon him by Ruth A. Burton, he has failed and neglected to pay her the said sum or any part thereof; and that, notwithstanding the fact that he had so drawn the money from the hands of the clerk under the order of the court, he stated falsely to the agent of Ruth A. Burton that the money was still in the hands of the treasurer of Silver Bow county, well knowing at the time that he had received the said sum as aforesaid and appropriated it to his own use.

Under the view we entertain of this case, it is not important to consider whether criminal proceedings have been instituted and prosecuted against the accused resulting in his conviction of the crimes charged. Subdivision 5 of the section under which the charges are preferred is broad enough to include crimes and misdemeanors of all kinds involving moral turpitude, whether within this jurisdiction or not, and whether within or without the sphere of official duty. If the charge sets forth such a crime, this court has exclusive jurisdiction to hear the evidence and determine the truth of it. Where the crime falls clearly without the sphere of official duty, it is discretionary with the court to hear and determine it upon the merits prior to a criminal prosecution and conviction in the local court; and it will refuse to entertain the accusation in the absence of urgent reasons why

it should do so. (*In re Wellcome*, 23 Mont. 140, 58 Pac. 45; *Id.*, 23 Mont. 213, 58 Pac. 47.) It is but just and fair to the accused that it should refrain from investigating and passing judgment upon such a charge, to the end that his rights may not be prejudiced. But where the conduct charged as the ground for removal falls within the sphere of official duty, as does that charged in this case, it is of no moment that it amounts to an offense against the criminal laws, nor whether criminal proceedings have been instituted and prosecuted to a conclusion.

This proceeding is in no sense a criminal prosecution; nor is it in aid of a criminal investigation. Its purpose is to ascertain whether the accused is worthy of confidence and possessed of that good moral character which is a condition precedent to the privilege of practicing law and of continuing in the practice thereof. (*In re Wellcome*, 23 Mont. 213, 58 Pac. 47; *In re Weed*, 26 Mont. 241, 67 Pac. 308.) "The end to be attained is not punishment, but protection." (*Case of Austin*, 5 Rawle, 191.) And the determination of the fitness of the person under consideration to continue in the practice being exclusively a matter for this court, it will not await the action of the criminal court and be controlled by the result of a prosecution, even though the finding of this court may be in effect that the accused is guilty of a crime.

The evidence submitted in this case leads to but one conclusion, namely, that the charges contained in the third and fourth counts are true. It appears, as charged in the third count, that Nickey, one of the defendants in the case of *Christie v. Nickey et al.*, was dissatisfied with the result of the trial and desired to take an appeal to the district court. He was about to leave the county of Silver Bow to be gone for several weeks, and, in order that his rights might be preserved, he put into the hands of the accused, who had been and still was his attorney in that case, the check mentioned in the charge, intending the sum of money payable thereon to the justice, to be used, to the amount of the judgment and costs (\$47.50), as a deposit in lieu of an undertaking on appeal. The balance was presumably intended to

pay for the transcript. He had a right to make the deposit. (Code of Civil Proc., sec. 1763.) He had a right to intrust the matter to his attorney. The latter, however instead of meriting this confidence, forged or caused to be forged the indorsement of the justice, obtained the money and appropriated it to his own use; and not only that, but failed to secure the appeal, thus further betraying the trust reposed in him. Whether these acts be designated as malpractice or a crime, in the absence of explanation the conclusion must be that the accused is unworthy of confidence.

So in regard to the evidence under the fourth count. Ruth A. Burton at the time she employed the accused about May 14, 1904, had been engaged in litigation over some property in the city of Butte. The action had been brought by her to determine an adverse claim to it by one Kipp under a purchase by him at an execution sale. Upon the filing of her complaint she paid into court \$490, the sum paid for the property by Kipp with interest. This was deposited by the clerk with the county treasurer, as his duty under the law required. The result of the litigation was adverse to the plaintiff (*Burton v. Kipp*, 30 Mont. 275, 76 Pac. 563). J. J. McHatton had up to this time been her attorney. Upon his telling her, as he did, that nothing more could be done for her, she consulted the accused, who represented to her that the case was not yet hopeless and undertook to prosecute it further, with the agreement that he was to be paid if he was successful, but that he should have nothing in the event of failure. Mrs. Burton was to pay court fees and other expenses. Questioned by Mrs. Burton as to what should be done with the deposit, he told her that it should be allowed to remain where it was, in order to keep her tender good until the end of the litigation. What was being done in the case does not appear; but immediately after his employment, he, as her attorney, and without her knowledge, obtained an order of the court permitting the deposit to be withdrawn and received it from the clerk less the amount deducted by the treasurer for taxes while it was in his hands. The amount received was \$414.90. Fur-

ther, under pretense that he was conducting the litigation in her behalf, he induced Mrs. Burton to pay him at various times in small amounts a total of \$65, by representing to her that these amounts were necessary to pay court fees and other expenses. Finally, after some months, through the intervention of friends she was able to purchase the claim of Kipp and clear up the title. During the negotiations the question came up again as to the disposition of the deposit, Mrs. Burton desiring Kipp to take it as part payment of the amount agreed upon with him as necessary to effect the settlement of the controversy. At this time, though Thresher had already withdrawn and misappropriated it, he asserted again and again that it was still in the hands of the county treasurer and could be withdrawn at any time.

It thus appears that the accused is wholly destitute of that degree of honesty and integrity which every member of the bar should possess, and which should characterize all of his dealings with those who repose trust and confidence in him.

The judgment of the court is, that B. S. Thresher be removed from his office as attorney and counselor at law, and that his name be stricken from the roll.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE MILBURN: I concur in the decision and order of the court, but not being fully satisfied that we may find an attorney guilty of felonious conduct in the absence of any attempt to try and convict him on the charge of felony in the district court, I withhold my concurrence in what is said in the opinion as to the accused being guilty of felony. Independently of actual violation of the criminal laws of the state, there is enough proof to show conclusively that Mr. Thresher has been guilty of conduct involving moral turpitude in connection with his office as attorney and counselor, and he should be disbarred.

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WEBSTER, RESPONDENT, v. SHERMAN, APPELLANT.

(No. 2,215.)

(Submitted January 18, 1906. Decided February 10, 1906.)

Claim and Delivery—Live Stock—Husband and Wife—Sales—Presumptions—Crops—Instructions—Measure of Damages—Interest—Harmless Error—Third Party Claims—Evidence—Value of Property.

Claim and Delivery—Husband and Wife—Live Stock—Sales.

1. Where, in an action in claim and delivery, it was shown that plaintiff, who had independent means of her own before marriage, bought certain live stock from her husband, together with the brand owned by him; that she purchased from other parties other cattle which she branded with the brand so acquired; that her husband thereafter used another brand; that plaintiff listed the property so purchased and paid taxes thereon; that it was generally known throughout the neighborhood that the brand bought by plaintiff and the stock bearing it belonged to her, and that after the sale the husband had nothing to do with the stock except to help care for it—the evidence was sufficient to show an immediate delivery and actual and continued change of possession of the property purchased by plaintiff from her husband, so as to constitute a valid sale as against the creditors of the husband.

Same—Personal Property—Sales—Husband and Wife—Presumptions.

2. *Quære*: Is section 4491 of the Civil Code, relative to transfers of personal property conclusively presumed to be fraudulent, applicable to transfers between husband and wife?

Same—Crops—Ownership—Presumptions—Instructions.

3. Where, in an action in claim and delivery, it appeared that certain hay grown upon plaintiff's land had been seeded and harvested by her husband under an arrangement between them, an instruction to the effect that ownership of the land carries with it a *prima facie* presumption of ownership of the crops grown upon it correctly stated the law.

Same—Measure of Damages—Conversion.

4. *Semble*: It would seem that the action in claim and delivery, where the property in dispute has been sold and dissipated so that it cannot be returned, is analogous to the action in conversion, and that the rule relative to the measure of damages applicable in such latter action should be applied in the absence of a code definition of the measure of damages recoverable in the former.

Same—Damages—Detention—Interest.

5. In an action in claim and delivery, where all the evidence of value of the property seized was directed to the date of seizure and where it was not claimed that it had any usable value, the damages for detention should have been limited to interest on the amount recovered from the date of seizure to the time the verdict was returned; and to this interest plaintiff was entitled without any special finding to that effect.

Same—Husband and Wife—Exclusive Possession—Instructions—Harmless Error.

6. An instruction, in an action in claim and delivery, where there was not any proof or offer of proof that the creditors of plaintiff's husband had been dealing with the latter on the credit of the property claimed by plaintiff, which erroneously told the jury that her property could not be taken for the husband's debts unless it was in his sole and exclusive possession at the time it was seized by the sheriff, instead of at the time the attaching creditors dealt with him in good faith on the credit of it, could not have misled the jury, and was not reversible error.

Same—Husband and Wife—Third Party Claims—Instructions.

7. An instruction to the effect that, in order for a wife to maintain an action in claim and delivery for property taken for the debts of her husband, it was necessary that she should have made a third party claim, and presented to the sheriff an affidavit in support thereof, was erroneous.

Same—Conflicting Instructions—Third Party Claim—Harmless Error.

8. The giving of conflicting instructions, in an action in claim and delivery, upon the necessity of making a third party claim to the sheriff, one of which instructions correctly stated the law, while the other was erroneous but in appellant's favor, will not warrant a reversal.

Same—Instructions—Applicability to Evidence.

9. In an action of claim and delivery, an instruction that if a married woman allows her separate property to be so mixed with that of her husband as to become indistinguishable, or acquiesces in its being so mingled, it must, as to the husband's creditors, be treated as relinquished to him, was properly refused where there was no evidence of such mingling.

Same—Instructions—Equipoise in Evidence.

10. An instruction telling the jury, in an action in claim and delivery, that plaintiff must prove the allegations of her complaint by a preponderance of the evidence, was equivalent to saying that if there was not any preponderance in her favor, or if the evidence was evenly balanced, she could not prevail, and the refusal of the court to specially instruct that if the evidence was evenly balanced the jury should find for defendant, was not error.

Instructions—Refusal—When not Error.

11. The refusal of an instruction not applicable to the facts presented is not error.

Claim and Delivery—Instructions.

12. A requested instruction, in an action in claim and delivery, which stated that if the jury should find the evidence for and against any material allegation of plaintiff's complaint to be evenly balanced, then plaintiff had failed to prove her case and verdict should be for defendant, was misleading, where issues were made in the pleadings as to the ownership and value of the several items of property in question. The instruction would have been proper if it had said that the verdict should be for defendant *as to the property described in that allegation*.

Same—Value of Property—Evidence—Exclusion.

13. Where, in an action in claim and delivery, the verdict fixed the value of the property in controversy at the price put upon it by defendant sheriff in his testimony, he cannot be heard to complain of a ruling of the court excluding offered testimony tending to show the price at which it sold at sheriff's sale.

Same—Husband and Wife—Declarations—Evidence—Creditors.

14. Testimony of statements made by the husband of plaintiff, in an action in claim and delivery, to his creditors that the property in controversy belonged to him, was properly excluded, where it was not followed up by any proof or offer of proof that the attaching creditors dealt with the husband upon the credit of the property in question.

Same—Evidence—Letters—Creditors.

15. A letter written by the husband of plaintiff, in an action in claim and delivery, to his creditors, in which he had listed the property in dispute as his, was properly excluded, where it appeared that the purpose of the writer in inditing it and of the creditors in having it written was to enable the creditors to secure a loan for the writer from another bank.

Appeal from District Court, Meagher County; W. R. C. Stewart, Judge.

ACTION by Sadie A. Webster, against C. A. Sherman, Sheriff of Meagher county. Judgment for plaintiff. Defendant appeals from the judgment and an order denying him a new trial. Modified and affirmed.

Mr. W. M. Johnston, and Mr. M. S. Gunn, for Appellant.

At the time of the alleged sale, nothing whatever was done toward making a delivery of the cattle and horse, except to transfer the brand on the animals and have the same recorded in the name of the wife. This was insufficient to constitute a delivery or change of possession of the property. (*Harmon v. Hawkin*, 18 Mont. 525, 46 Pac. 439; *Story v. Cordell*, 13 Mont. 205, 33 Pac. 6; *Murphy v. Mulgrew*, 102 Cal. 547, 41 Am. St. Rep. 200, 36 Pac. 857; *O'Kane v. Whelan*, 124 Cal. 200, 71 Am. St. Rep. 42, 56 Pac. 880; *McKee v. Garcelon*, 60 Me. 165, 11 Am. Rep. 200; *Sweeney v. Coe*, 12 Colo. 485, 21 Pac. 705; *Autrey v. Bowen*, 7 Colo. App. 408, 43 Pac. 908; *Bassinger v. Spangler*, 9 Colo. 175, 10 Pac. 809; *Walden v. Murdock*, 23 Cal. 540, 83 Am. Dec. 135.) A delivery in the year 1903 was not such an immediate delivery as is necessary to a valid sale. If the property had actually been delivered in the year 1903, it would, nevertheless, have been subject to seizure for an indebtedness against the husband. (*Watson v. Rodgers*, 53 Cal. 401; *Autrey*

v. *Bowen*, 7 Colo. App. 408, 43 Pac. 908.) If it should be considered that because the wife was residing on the ranch with her husband they were jointly in possession of the property, the sale would still be invalid, because the statute does not permit a joint or concurrent possession in both the vendor and vendee. (*Bassinger v. Spangler*, *supra*; *Wheeler v. Selden*, 63 Vt. 429, 25 Am. St. Rep. 771, 21 Atl. 615, 12 L. R. A. 600.) The good faith of the parties is immaterial if there was no immediate delivery and actual and continued change of possession. (*Bassinger v. Spangler*, *supra*; *Lawrence v. Burnham*, 4 Nev. 361, 97 Am. Dec. 540.) There is no statute making the record of a brand notice of ownership of animals bearing the brand. If, however, such a statute existed, the recording of the brand would not take the place of a delivery or constitute a change of possession of the animals. (*Murphy v. Mulgrew*, 102 Cal. 547, 41 Am. St. Rep. 200, 36 Pac. 857.) The fact that the cattle and horse were branded with a brand recorded in the name of the plaintiff was not implied notice of her ownership of the animals. (*Stewart v. Hunter*, 16 Or. 62, 8 Am. St. Rep. 267, 16 Pac. 876.) Evidence tending to show that it was generally known among the neighbors that the plaintiff had become the owner of the property in question, is wholly immaterial, for if there was not a delivery and an actual and continued change of possession, the sale would be invalid as to the creditors of the husband, although they had actual knowledge of the sale. (*Harkness v. Smith*, 3 Idaho, 221, 28 Pac. 423.) The question of what constitutes a delivery is a question of law. (*Vance v. Boynton*, 8 Cal. 555.)

Plaintiff was not the owner of the hay described in her complaint, but the same belonged to her husband. (See *Skinner v. Skinner*, 38 Neb. 756, 57 N. W. 534; *Estate of Hauer*, 140 Pa. St. 420, 23 Am. St. Rep. 245; *St. Louis Ry. Co. v. Hall*, 71 Ark. 302, 74 S. W. 294; *Lyon v. Green Bay etc. Ry. Co.*, 42 Wis. 548; *Sharp v. Wood*, 21 Ky. Law Rep. 189, 51 S. W. 15; *Elijah v. Taylor*, 37 Ill. 247.) The mere proof of ownership of the land was insufficient to raise a presumption of ownership of the

crop in the light of the other evidence. (*Estate of Hauer*, 140 Pa. St. 420, 23 Am. St. Rep. 245, 21 Atl. 445; *Elijah v. Taylor*, 37 Ill. 247; *Sharp v. Wood*, 21 Ky. Law Rep. 189, 51 S. W. 15.) The hay and cattle not having any usable value, and no claim being made for the loss of the use of the horses, buggy and harness, damages for the detention should have been measured by the interest on the value of the property. (Cobbey on Replevin, 2d ed., sec. 855; *State Bank of Stockton v. Showers*, 65 Kan. 431, 70 Pac. 332; *Hall v. Tillman*, 110 N. C. 220, 14 S. E. 745; *Allen v. Fox*, 51 N. Y. 562, 10 Am. Rep. 641; *Austin v. Terry*, 13 Colo. App. 141, 56 Pac. 810; *Biglow v. Doolittle*, 36 Wis. 115; *Webb v. Phillips*, 80 Fed. 954, 26 C. C. A. 272.)

It is improper for a witness to express his opinion as to the amount of the damages. (*St. Louis Ry. Co. v. Hall*, 71 Ark. 302, 74 S. W. 293; 2 Sedgwick on Damages, 7th ed., 633; *St. Louis etc. Ry. Co. v. Jones*, 59 Ark. 105, 26 S. W. 595; *Norman v. Wells*, 17 Wend. 136.)

Messrs. Hartman & Hartman, and Mr. N. B. Smith, for Respondent.

Whether there was a delivery and actual and continued change of possession is or may be a question of mixed law and fact. (*Dodge v. Jones*, 7 Mont. 121-127, 14 Pac. 707.) But when the facts constituting such delivery and change of possession are undisputed, whether or not the requirements of the statute have been complied with is a question of law for the court. (*Dodge v. Jones*, 7 Mont. 121-135, 14 Pac. 707; *Cady v. Zimmerman*, 20 Mont. 225, 228, 230, 50 Pac. 553.) The witnesses all stated the various facts upon which they based the amount of damages, and then stated the amount which in their judgment plaintiff would be damaged by the detention of the property. The witnesses having been subjected to severe cross-examination, it is well settled that this was a proper method of proving damages. (*Carron v. Wood*, 10 Mont. 500, 508, 26 Pac. 388; *Gallatin Canal Co. v. Lay*, 10 Mont. 528-532, 26 Pac.

1001; *Holland v. Huston*, 20 Mont. 84, 49 Pac. 390; *Montana Ry. Co. v. Warren*, 6 Mont. 275, 12 Pac. 641.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action in claim and delivery, brought by Sadie A. Webster against the sheriff of Meagher county, to recover the possession of certain personal property alleged to have been wrongfully taken and detained by the defendant, or to recover its value, alleged to be \$4,185, in case recovery of the possession could not be had, and for \$500 damages for the wrongful detention of the property. The property consisted of stock cattle, horses, some hay, a buggy, and a single harness. The answer denies that the plaintiff was ever the owner or entitled to the possession of the property. The prices fixed in the complaint for the various items of property are disputed, except as to the buggy, harness, and two horses; and in the answer prices are fixed for the various items which, with the admissions referred to, place the total valuation of the property at \$2,570. The answer admits that the hay was worth \$1,410, and fixes the value at \$7 per ton, which is an admission that two hundred and one and three-sevenths tons were seized. The answer seeks to justify the seizure by alleging that the property was all the property of Frank S. Webster, and was seized under attachment and execution issued in an action wherein Alexander & Hopkins, copartners doing business under the firm name of Merchants' Bank of Forsyth, were plaintiffs, and Frank S. Webster was defendant.

The answer further alleges that Frank S. Webster and the plaintiff are husband and wife; that plaintiff never filed an inventory of her separate property; that all the property in controversy was continuously for a long time prior to the seizure in the sole and exclusive possession of Frank S. Webster, and that Alexander & Hopkins extended credit to Frank S. Webster for the debt sued upon in good faith on the credit of all this property being the property of Frank S. Webster, and upon the representations of Frank S. Webster that such property was his;

and that these representations were made with the knowledge and consent of plaintiff, Sadie A. Webster; and finally it is alleged that Alexander & Hopkins had no knowledge or notice that Sadie A. Webster claimed or owned the property in controversy. All these allegations are put in issue by reply, except the allegations that the plaintiff is the wife of Frank S. Webster, and that she never filed an inventory of her separate property.

The cause was tried to the district court sitting with a jury. The jury returned a verdict in favor of the plaintiff for the return of the property, or for its value in case return could not be had, as follows: Fifty-four head of cattle, of the value of \$1,350; three head of horses of the value of \$115; the buggy, of the value of \$15; the single harness, of the value of \$5; and two hundred and one and three-sevenths tons of hay, of the value of \$1,410; and for \$250 damages for the detention of the property. As the evidence was all with respect to fifty head of cattle only, the plaintiff remitted from the amount of the verdict four head of cattle, or \$100, the value thereof, and judgment was rendered and entered on the verdict as thus amended; and from this judgment and an order denying him a new trial defendant appealed.

It appears from the evidence that certain of the cattle and one horse were purchased by the plaintiff from her husband, Frank S. Webster. Appellant specifies as error (1) the refusal of the trial court to grant a new trial, for the reason that the evidence is insufficient (a) to show any immediate delivery and actual and continued change of possession of the property purchased by plaintiff from her husband, (b) to show that plaintiff owned the hay in controversy, and (c) to sustain the verdict for \$250 damages; (2) the giving of certain instructions asked by the plaintiff, and the refusal to give certain instructions asked by defendant; and (3) the admission of certain testimony offered by the plaintiff, and the refusal of certain testimony offered by the defendant.

1. (a) The answer does not allege any fraud in fact in the transaction between the plaintiff and her husband respecting

the purchase of the property which she did purchase from him in October, 1901. Defendant, however, relies upon the proposition that the evidence is insufficient to show an immediate delivery and actual and continued change of possession and therefore the transaction was fraudulent in law under section 4491 of the Civil Code, and in support of this cites *Harmon v. Hawkins*, 18 Mont. 525, 46 Pac. 439, *Story v. Cordell*, 13 Mont. 204, 33 Pac. 6, and cases from other courts.

The evidence shows that in October, 1901, the plaintiff, who had independent means of her own at the time of her marriage with Frank S. Webster, purchased from him eleven head of adult cattle, ten calves, and a stallion, for \$392.65; that the stallion and these cattle and the increase of the cattle were a portion of the property seized by the sheriff in this instance; that the animals so purchased were branded with an "angle R" brand, and were all the animals owned by Frank S. Webster branded with that brand; that he sold to the plaintiff his brand, which had been recorded, and that the plaintiff caused the recorder of marks and brands to make the proper transfer of the same to her; that she purchased from another party other live stock upon which she placed this same brand; and that thereafter Frank S. Webster used a "6 U quarter circle" brand. The evidence shows that the plaintiff owns one hundred and twenty acres of land, a desert entry; that Frank S. Webster has a homestead of one hundred and sixty acres; that these two tracts of land, together with about twenty-five sections of railroad land, were inclosed together. Respecting the railroad land the plaintiff testified: "The railroad land was mine." The evidence also shows that the animals purchased from Frank S. Webster, together with other personal property belonging to the plaintiff, were kept upon this ranch upon which the plaintiff and her husband, Frank S. Webster, resided; that plaintiff listed this property for taxation and paid the taxes thereon for 1903; that it was generally known throughout the neighborhood that the "angle R" brand and the stock bearing it belonged to the plaintiff, Sadie A. Webster; and that after the sale Frank S. Webster

had nothing whatever to do with this stock, except to help care for it for Sadie A. Webster.

The court instructed the jury that if they believed from the evidence the facts detailed, and that the sale was made in good faith, without any fraudulent intent, they should then find that this was such an immediate delivery and actual and continued change of possession as would constitute the sale a valid one as against the creditors of Frank S. Webster.

The case of *Harmon v. Hawkins*, relied upon by appellant, was one in conversion, and upon appeal to this court the only question presented was whether the complaint stated a cause of action. The plaintiff had assumed to deraign his title to the property in controversy in that case, and to set forth in his complaint all the facts regarding the same. This court held that the complaint was insufficient, in that it failed to allege any delivery whatever of the property to the plaintiff Harmon, or any change of possession at the time he purchased.

In *Story v. Cordell*, this court merely held that the bill of sale given by Cordell to Story & Co. amounted, in fact, to a chattel mortgage, and was void as failing to comply with the law respecting mortgages of personal property.

Since those decisions were rendered, this court has had occasion to consider section 4491 above, and to review the decisions in those cases. In *Cady v. Zimmerman et al.*, 20 Mont. 225, 50 Pac. 553, this court went quite fully into the question now presented, and there approved the doctrine announced in the early case of *Dodge v. Jones*, 7 Mont. 121, 14 Pac. 707, and in *Porter v. Bucher*, 98 Cal. 454, 33 Pac. 335, and quoted with approval from the decision in the *Dodge Case*, as follows: "No particular act or formal ceremony is necessary to make a delivery in law. Any act done, coupled with the intent to change the ownership, which has the effect to transfer the dominion over the thing sold to the buyer, is a delivery. Any small chattel capable of being handled may be delivered by handing it to the buyer, as selling goods across the counter in a store; but horses are not capable of this manual kind of delivery. We think

when the bar was branded under the 'K,' so that the appellant's horses could be distinguished from those of the Kirkpatricks, and they were turned out on the same range, those acts were done with the intent to transfer the ownership and dominion over these horses to the appellant."

Thus far we have proceeded upon the assumption that section 4491 above is applicable to a transfer of personal property between husband and wife; but it is at least a serious question whether it has such application. Under its provisions any creditor of the vendor can raise the question of the want of immediate delivery or actual and continued change of possession of the property sold; but, if the transaction be between husband and wife, may the rule not be altogether different? If the sale was sufficient to pass title from the husband to the wife, as between themselves, the property actually becomes the separate property of the wife, and, under section 227 of the Civil Code, cannot be held "liable for the debts of the husband unless such property is in the sole and exclusive possession of the husband, and then only to such persons as deal with the husband in good faith on the credit of such property without knowledge or notice that the property belongs to the wife." Under this section these inquiries are pertinent: Did the husband have the sole and exclusive possession of the property? Did the creditor deal with the husband in good faith on the credit of the property? And, finally, did the creditor have any knowledge of the wife's ownership of the property? Under section 4491 above, not any of these inquiries would be material.

In *Crawford v. Davis*, 99 Pa. St. 576, it is said: "In the determination of the question as to the kind of possession necessary to be given (in order to make a sale of personal property valid as against creditors) regard must be had, not only to the character of the property, but also to the nature of the transaction, the position of the parties, and the intended use of the property." This is quoted with approval in *Porter v. Bucher* above, and to it is added: "The law only requires that which could naturally be done in an honest and business-like transac-

tion, where there was no thought of fraud or concealment." The facts in *Crawford v. Davis* and in *Porter v. Bucher* are almost identical with those in the case at bar; and, if the facts disclosed in those cases and in the case of *Dodge v. Jones* above will support a finding of a sufficient delivery and actual and continued change of possession to satisfy the law, it is clear that they do so in this instance.

The law does not require the plaintiff to abandon her own home and the use of her own real estate, or desert her husband, in order to hold property in her own name free from the claims of her husband's creditors, even though she purchased it from him. It is difficult to understand just what more could have been expected of her under the circumstances; for she appears to have done everything which could have been done, regard being had to the nature of the property, its intended use, and the situation and relation of herself and her husband.

(b) The hay in controversy was grown upon plaintiff's desert claim. It was seeded and harvested by the husband under some kind of an arrangement between them. The court instructed the jury that the ownership of the land carries with it a *prima facie* presumption that such owner is likewise the owner of the crops grown upon the land. We think this correctly states the rule. (12 Cyc. 976; *Ellestad v. Northwestern Elevator Co.*, 6 N. Dak. 88, 69 N. W. 44.) Of course, that presumption is a disputable one, and it was so explained to the jury by the court in making a direct application of the rule to the case at bar. We think the court properly submitted to the jury the question whether or not there was any arrangement between the plaintiff and her husband under which the title to the hay grown upon plaintiff's land should vest in her husband, and thereby overcome the presumption announced in the rule above.

(c) Upon the trial plaintiff offered evidence to prove her general damages which she claimed to have sustained by reason of the wrongful detention of her property by the defendant. The evidence consisted of opinions of witnesses given in response to the following question: "Q. Assuming that there were fifty

adult cattle, with their calves, owned by the plaintiff and run upon that ranch on the 22d of August, 1903, which had been all raised upon the ranch, and which constituted her stock or bunch of stock cattle and her cattle business, and they were taken from her, taken away from her at that time, and she had plenty of feed to feed them through the winter, and were detained from her up until the present time so as to prevent her going on with her stock business, what would you say she was damaged by reason of the taking and detention of those cattle?"

The property in controversy was seized by the sheriff on August 22, 1903. This action was commenced on October 10th of the same year, and the property so seized was sold under execution on December 22d following. The cause was tried in June, 1904, so that at the time of the trial it was apparent that, as the property had been sold and dissipated, it could not be returned, and that, if plaintiff prevailed, she would be left to the alternative of accepting such sum of money as the value of the property as might be returned by the jury, together with damages for the wrongful taking and detention of the same. Our Code does not define the measure of damages in a case of this character; but, upon reason, it would appear to be analogous to the action in conversion, and that the rule applicable in such an action should be applied.

Section 4333 of the Civil Code prescribes the rule for ascertaining damages in a case of conversion, as follows: "The detriment caused by the wrongful conversion of personal property is presumed to be: (1) The value of the property at the time of its conversion, with the interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party. * * * " All the evidence of value was directed to the date of seizure of the property, and, in our opinion, the damages for detention should have been limited to interest on the amount recovered from the date of seizure of the property to the time the verdict was returned. This appears to be the

view of text-writers and courts. (2 Cobbey on Replevin, sec. 855, and cases cited; *Kelly v. McKibben*, 54 Cal. 192; *Schmidt v. Nunan*, 63 Cal. 371; *State Bank v. Showers*, 65 Kan. 431, 70 Pac. 332.) And to this interest plaintiff was entitled without any special finding to that effect. It is to be observed that there are no allegations of special damages in the complaint. It is not claimed that any of the property had a usable value. The difference between the damages allowed by the jury for the detention and interest on the value of the property fixed by the jury from the time of its seizure to the date of the verdict is \$66.75.

2. The district court gave instructions 7 and 18, which in effect told the jury that, if they believed from the evidence that the property was the property of the plaintiff, it could not then be taken for her husband's debts, unless such property was in the sole and exclusive possession of her husband at the time it was seized by the sheriff, and that Alexander & Hopkins dealt with Frank S. Webster in good faith on the credit of the property. Appellant contends that these instructions are erroneous in referring to the time the property was seized by the sheriff, instead of the time Alexander & Hopkins extended credit to Frank S. Webster. The criticism is just; but the court would have been fully justified in not giving any instruction upon the subject at all, for there was no proof whatever, and no offer of proof, that Alexander & Hopkins dealt with Webster on the credit of this property. The instructions, therefore, were upon an entirely immaterial matter, and could not have misled the jury. Under the decisions of this court in *Thornton-Thomas Merc. Co. v. Bretherton*, 32 Mont. 80, 80 Pac. 10, and *Robinson v. Mills*, 25 Mont. 391, 65 Pac. 114, the error is not a reversible one.

The court also gave instructions 9 and 20, which are conflicting. In No. 9 the court told the jury that the plaintiff in this action could not prevail unless it appeared that she had made a third party claim and presented to the sheriff an affidavit in support thereof; and in No. 20 the court in effect said to the jury that it was not necessary for the plaintiff to make such

claim in order to maintain her action. Instruction No. 20, of course, correctly states the law, and instruction No. 9 is erroneous; but the error is altogether in the defendant's favor, and therefore a mere conflict in the instructions will not warrant a reversal. (*State v. Jones*, 32 Mont. 442, 80 Pac. 1095; *Robinson v. Mills*, above; *Thornton-Thomas Merc. Co. v. Bretherton*, above.) This consideration of the instructions given disposes of the questions presented by the instructions which were refused, which relate to the same subjects.

The court was asked by defendant to instruct the jury that if a married woman willingly allows her separate property to be so mixed into a common mass with that of her husband so as to become indistinguishable, or if she acquiesces in its being so mingled, it must, as to the husband's creditors, be treated as relinquished to the husband. While this may be a correct statement of an abstract proposition of law, it was not applicable to this case; for there was no proof whatever of any such mingling or mixing of the property of plaintiff and that of her husband.

The court instructed the jury that it was incumbent upon the plaintiff to prove the allegations of her complaint which were not admitted by a preponderance of the evidence. The defendant then asked the court to give an instruction which properly defines "preponderance of the evidence," but which adds this sentence: "If, after a comparison and consideration of all the evidence in this action, you find the evidence for and against any material allegation of plaintiff's complaint to be evenly balanced, then plaintiff has failed to prove her case, and your verdict should be for the defendant." When the court told the jury that the plaintiff must prove the allegations of her complaint by a preponderance of the evidence, this was, in effect, saying that if there was not any preponderance in her favor, or if the evidence was evenly balanced, the plaintiff could not prevail. (*Harper v. State*, 101 Ind. 109.) However, the sentence quoted above renders the instruction asked erroneous or likely to mislead the jury. A material allegation of plaintiff's complaint is

that she was the owner of four cows, of the value of \$35 a head; but the mere fact that the evidence with relation to this particular allegation might be evenly balanced would not defeat her entire cause of action. And this is particularly pertinent here, where issues are made by the pleadings as to the ownership and value of the several items of property. The instruction asked for should have said, after reciting the facts: "Then your verdict should be for the defendant *as to the property described in that allegation.*"

3. The defendant sought to show the price for which the cattle in controversy sold at the sheriff's sale, but the court excluded the offered testimony. However, the verdict rendered by the jury fixes the value of the cattle exactly at the price put upon them by the defendant himself in his testimony, and therefore he cannot complain of this ruling.

Frank S. Webster was a witness for the plaintiff, and upon his cross-examination he was asked if on or about July 15, 1902, at Forsyth, Montana, he had not made a statement to Mr. Terrett, the cashier of the Merchants' Bank of Forsyth, that all the cattle on his ranch, including those now claimed by the wife, belonged to him, or words to that effect; and a like effort was made to prove the same by the witness Terrett, a witness for the defendant. It was also sought to show that Frank S. Webster had written a letter to the bank in which he listed the property now claimed by his wife as his property. All this offered testimony was excluded.

The connection in which the evidence was offered discloses that the purpose in offering it was to show that Frank S. Webster held out to Alexander & Hopkins that this property was his, for the purpose of obtaining credit for the moneys for which Alexander & Hopkins had sued him and had attached the property in controversy, and that it was offered for no other purpose. We think there was no prejudicial error in the court's ruling, as it was not followed up by any proof or offer of proof that Alexander & Hopkins dealt with Frank S. Webster upon the credit of the property. It was entirely immaterial what pur-

pose Frank S. Webster had in making those representations, if he did in fact make them. If this property belonged to the plaintiff, it could not be seized for the debt of Frank S. Webster, unless at the time the debt was contracted the property was in the sole and exclusive possession of Frank S. Webster, and Alexander & Hopkins extended credit to him upon the belief in good faith that the property did belong to him, and without any knowledge of the wife's claim of ownership. So far at least as the letter was concerned, the testimony would seem to indicate that the purpose of Webster in writing it, and of Alexander & Hopkins in having it written, was to enable Alexander & Hopkins to secure a loan for Webster from a bank in Omaha; for Alexander, who was a witness for the defendant, testified that the last he knew of the letter he sent it to Omaha, to the cashier of the South Omaha National Bank, and said: "The purpose in sending this letter to Omaha was to get a loan for Frank S. Webster."

The order denying defendant a new trial is affirmed. The cause is remanded to the district court, with directions to modify the judgment by reducing the amount thereof \$66.75, and, when so modified, it will be affirmed.

Modified and affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

33	464
36	578

33	464
138	104

33	464
39	459

33	464
40	592

NORD, RESPONDENT, v. BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,
APPELLANT.

(No. 2,222.)

(Submitted January 10, 1906. Decided February 10, 1906.)

New Trial—Statement—Service—Sufficiency—Waiver—Principal and Agent—Personal Injuries—Instructions—Contributory Negligence—Assumption of Risk—Burden of Proof.

New Trial—Statement—Preparation and Service—District Courts.

1. Where, by stipulation of counsel, the time for the preparation and service of a statement on motion for a new trial had been extended for ninety days, the district court had power to grant a further extension, without the consent of the adverse party and upon good cause shown, within the limit of ninety days prescribed by Code of Civil Procedure, section 1897, as amended by Session Laws, 1903, page 38, and service made during the time so granted by the court was timely.

Same—Constructive Service—When Insufficient.

2. Constructive service of a statement on motion for a new trial, by delivery thereof to a person who, although at one time a stenographer in the office of the attorney upon whom service was attempted to be made, was not then in his office or in charge of it but employed elsewhere, was insufficient.

Same—Principal and Agent—Ratification.

3. An attorney attempting service of a statement on motion for a new trial upon opposing counsel by delivery thereof to a person who, although at one time in the latter's employ in a clerical capacity, was then employed elsewhere but assumed to act for him notwithstanding, is charged with the duty of ascertaining that person's authority for accepting service, and lack of notice of the clerk's discharge is of no moment.

Same.

4. Where constructive service of a statement on motion for a new trial was attempted to be made by delivery of a copy thereof to a former clerk of the attorney to be served, who assumed to act for her former employer in accepting service and entering into a stipulation for an extension of time in which to file objections thereto, the silence of the attorney, upon being asked whether he would repudiate the action of the clerk, cannot be construed to have been a ratification of the clerk's acts.

Same.

5. An attorney by securing an order of court extending the time within which to propose amendments to a statement on motion for a new trial, without relying upon a stipulation for an extension of time entered into by a former clerk when no longer in his employ, did not thereby ratify the clerk's action in accepting service of the statement at the same time, especially when the order was made with a reservation of all his rights to object to the settlement of the state-

ment and to the granting of a new trial on the ground of insufficiency of the service.

Same—Waiver—Burden of Proof.

6. The burden of proving a waiver of insufficient service of a statement on motion for a new trial rests upon him who alleges it, and the proof must be clear and satisfactory.

Same—Waiver—Objection to Settlement.

7. An attorney who at each step taken in the settlement of a statement on motion for a new trial preserved his right to object to its settlement on the ground that legal, timely or sufficient service had not been made, did not waive the failure of service by appearing in court and asking for additional time in which to prepare amendments and thereafter filing same.

Personal Injuries—Instructions—Contributory Negligence—Assumption of Risk—Burden of Proof.

8. An instruction, in an action for personal injuries, which told the jury that the burden was upon defendant to show contributory negligence and assumption of risk, was not objectionable, where in other paragraphs of the charge they were informed that their verdict should be for defendant in case either defense was established by a preponderance of the evidence.

Same.

9. Except in that class of cases of personal injuries where the complaint shows that the proximate cause of the injury was plaintiff's own act, contributory negligence and assumption of risk are affirmative defenses, and the burden of establishing them by a preponderance of the evidence rests upon the defendant.

ON MOTION FOR REHEARING.

New Trial—Statement—Service—Principal and Agent.

10. Where it did not appear that a stenographer in an attorney's office had ever been the agent of her employer for any other purpose than to receive service of papers while in his employ and in his office or in charge of it (Code of Civil Procedure, section 1831), an attorney, in attempting to make service of a statement on motion for a new trial by handing same to such stenographer, then employed elsewhere and located in a different building, did so with full knowledge that she was no longer authorized to accept service of papers for her former employer, and was therefore bound at his peril to ascertain her authority in acting in his behalf.

Same—Constructive Service—How Made.

11. If constructive service of a paper is sought to be made upon an attorney, during his absence from his office, by delivery to his clerk, it must be under Code of Civil Procedure, section 1831, by leaving it with the clerk "therein" (the attorney's office), and not by leaving it with the clerk elsewhere.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

Action by Nels Nord against the Boston and Montana Consolidated Copper and Silver Mining Company. From a judgment in favor of plaintiff, and an order denying a motion for a new trial, defendant appeals. **Affirmed.**

Mr. Ransom Cooper, and Mr. William T. Pigott, for Appellant.

Mr. A. C. Gormley, and Messrs. Word & Word, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to recover damages for personal injury caused by the alleged negligence of the defendant. For the purposes of this decision, a sufficient statement of the case will be found in the opinion delivered by this court on the former appeal. (*Nord v. Boston & Mont. C. C. & S. M. Co.*, 30 Mont. 48, 75 Pac. 681.) Upon another trial the jury found in favor of the plaintiff. The present appeal is from the judgment rendered upon the verdict, and from an order overruling defendant's motion for a new trial.

Counsel for plaintiff makes the contention that the order denying the motion for a new trial cannot be considered upon the merits, for the reason that counsel for defendant failed to make legal, timely, or sufficient service of their statement in support of the motion in the district court, and therefore that the record embodying the matters relied on is not properly before this court. If this contention is sustained, we must, in reviewing the case, confine our discussion to such questions only as arise from the judgment-roll. Counsel for defendant insist that such service as made of the statement was legal, timely, and sufficient, but, if not, that counsel for respondent waived all defects and irregularities in the proceedings, and may not now be heard to object to a review of this appeal on its merits. We shall first notice these contentions.

The undisputed facts touching the service and settlement of the statement are the following: The verdict was rendered on June 14, 1904. On the 16th, by stipulation by counsel, the time for the preparation and service of the statement on motion for new trial was extended for sixty days from June 24th. On August 19th, by a like stipulation, the time was again ex-

tended for thirty days from August 24th. On September 17th the court, upon good cause shown, further extended the time until October 24th. A. C. Gormley, counsel for plaintiff, was then absent from the county, being engaged in a canvass of the state as a candidate for Congress. He had up to August 15th or 16th had in his employ in his office as stenographer, Frances A. Bennett. At that time she left his employ to enter the office of her father. Her father's office adjoined that of Mr. Gormley, and the two were connected by a doorway. After that date and up to September 28th, when he left the city, whenever Mr. Gormley had any stenographic work to do, he had Miss Bennett do it for him on the "piece plan." On leaving the city Mr. Gormley closed and locked his office and left the key with his wife at the family residence in Great Falls. His residence was known to counsel for appellant. His wife received and attended to his mail. He was not present in the city but once from the time he first left it, until November 5th. In the meantime Miss Bennett had no access to his office.

On October 21st Mr. Cooper, one of counsel for defendant, wishing to serve the statement, went to Mr. Gormley's office with it. He found the office closed and locked. Having made inquiry for the whereabouts of Miss Bennett and being told that she was at "the Democratic headquarters," in a building across the street, he went in search of her and found her there. She was at that time regularly employed as stenographer by the Democratic central committee. There is some controversy as to what statement she made to Mr. Cooper, but assuming the latter's statement to be correct, she told him upon inquiry that she was authorized to accept service for Mr. Gormley; at any rate, she did accept service and promised to notify Mr. Gormley, but did not, in fact, do so, because telephone connection could not be had with him. At that time Mr. Cooper told her that he would extend the time, if desirable, in which Mr. Gormley might propose amendments to the statement. On November 4th, and before she had seen Mr. Gormley and without his knowledge, she stipulated with Mr. Cooper, for Mr. Gormley, for an

extension of time until November 10th, signing Mr. Gormley's name to the stipulation, and on the same day procured an order to be signed by the district judge, extending the time to November 10th.

On November 5th Mr. Gormley was in his office for a short time. He was found there by Mr. Cooper, who desired to know whether Mr. Gormley would repudiate the stipulation made by Miss Bennett in his behalf. At that time Mr. Gormley, as he says, questioned the service of the statement. Mr. Cooper insists that he questioned it only with reference to the time of it, but said nothing as to the authority of Miss Bennett to accept service. The record is somewhat indefinite as to what was said exactly; it is not controverted, however, but that Mr. Gormley stated that he had been too busy in the campaign to think about law business; that "there was question about that service," and that he "would take a little time to think it over before agreeing to anything." Mr. Cooper told him that he could have time to propose amendments if he desired it.

On November 9th, Mr. Cooper having concluded, apparently, that Mr. Gormley did not intend to recognize Miss Bennett's stipulation, submitted the statement to the judge for settlement; the paper containing the written submission reciting that "whereas, more than ten days have elapsed since the service of said proposed statement on motion for a new trial as aforesaid and no amendments having been proposed thereto or served upon counsel for defendant, and the time of the said plaintiff within which to propose amendments to said statement on motion for a new trial having elapsed," etc. In the meantime, on November 7th, Mr. Gormley obtained from the judge time in which to propose amendments "without waiving," as the order recited, "any rights to object to defendant's statement on the ground that the same was not served or filed in time, or for any other reason, the plaintiff reserving any and all rights to object to said statement," etc.

Finally the statement came on for settlement on December 8th. Counsel for plaintiff had in the meantime submitted cer-

tain amendments, prefacing them with a statement that he submitted them "without waiving his right to object to the settlement of the defendant's statement on motion for a new trial, on the ground, and for the reason that no legal, timely, or sufficient service of said statement was made, and plaintiff hereby reserving his right to make any and all objections because of the defendant's failure to serve and file said statement in time, as aforesaid, which rights were reserved to the plaintiff in the court's order extending the time," etc. At the conclusion of the proposed amendments was the following reservation: "The foregoing amendments are proposed with the reservations and objections first above mentioned, and, when the statement and amendments are brought on for settlement, proof will be offered in support of the plaintiff's said objections."

Evidence was introduced showing the manner and time of service as above narrated. The court settled the statement "without prejudice to plaintiff's said objections." When the motion came on for hearing, objection to its consideration was made as follows: "Before proceeding with the hearing of the defendant's motion for a new trial, the plaintiff renews the objections heretofore made to any order granting a new trial, and asks that said motion be denied on the ground and for the reason that no legal, timely, or sufficient service * * * was ever made * * * and plaintiff appears at the hearing * * * without waiving any of his said objections." In its order denying the motion, all objections were overruled by the court, but no reason was assigned therefor.

It is said by counsel for plaintiff that the service was not timely, for the reason that the statute authorizing extensions of time in such cases (Code of Civil Proc., sec. 1897, amended by Session Laws, 1903, p. 38, Chap. XXVII), gives no power to the court or judge to grant an extension for a longer time than ninety days without the consent of the adverse party, and that since the order of September 17th was without his consent, service made during the time granted by it was not effectual. There is no merit in this contention. If the parties extend the time by stipu-

lation, the power of the court or judge in the premises is, for the time being, in abeyance. If application be made for an extension before the expiration of the stipulated period, upon good cause shown, such application calls into activity the power vested by the statute, and an extension may be granted without the consent of the adverse party, within the prescribed limit. (Spelling on New Trial and Appeal, sec. 450; *Curtis v. Superior Court*, 70 Cal. 390, 11 Pac. 652.) This must be true, else, wherever the parties venture to stipulate for time, this fact itself deprives the court of the power vested in it by the statute.

The next question for consideration, then, is: Was the service upon Miss Bennett sufficient? If not, did counsel, by anything he did thereafter, ratify her acceptance of service or waive his right to object to the statement because of her want of authority? The statute controlling the service of notices and other papers in the conduct of litigation is section 1831 of the Code of Civil Procedure. Under it service may be made upon the attorney of the adverse party, (first) personally, by delivery to the attorney of the notice or paper; or, (second) constructively by leaving the notice or paper in the office of the attorney, during his absence, with his clerk therein or with a person in charge thereof; or, (third) when there is no person in the office, by leaving the paper or notice in the office in a conspicuous place, between 8 A. M. and 6 P. M.; or, (fourth) if the office be not open, by leaving the paper or notice at the attorney's residence with a person of suitable age and discretion; or, (fifth) if the residence of the attorney be not known, by putting the notice or paper inclosed in an envelope, into the postoffice, directed to the attorney.

In this case, constructive service upon the attorney was attempted by delivery of the statement to Miss Bennett, his alleged clerk. The facts clearly show that Miss Bennett was not his clerk, nor was she in the office or in charge of it. She was not in the employ of Mr. Gormley in any capacity. From no point of view was this service, as made, sufficient, or any service at all. The fact that Miss Bennett had theretofore been

Mr. Gormley's clerk, that notice of her discharge had not been given Mr. Cooper, or that she assumed to act for Mr. Gormley, cannot avail. One dealing with a supposed agent must ascertain at his peril whether in fact the supposed agency exists.

Did Mr. Gormley, by any act done on November 5th or afterward, ratify her acceptance of service or waive his right to object to the proceeding upon the motion? If so, such ratification or waiver was made in the conversation with Mr. Cooper on November 5th, or by the securing of the order of the 7th, granting time to propose amendments. Nothing in the conversation of the 5th justifies the inference of waiver or ratification; for, though Mr. Gormley did not repudiate anything that Miss Bennett had done, nor say that she was not his clerk, yet he did refuse to agree to anything until he had time to think the matter over, thus clearly refusing to be bound by anything that had occurred up to that time as between Mr. Cooper and Miss Bennett. Mr. Cooper's purpose in going to Mr. Gormley's office was to ascertain if he would repudiate the stipulation made in his behalf by Miss Bennett on November 4th. Under the circumstances, Mr. Gormley was not bound to say whether he would or would not repudiate it. No inquiry having been made of him as to whether or not Miss Bennett was his clerk at the time she accepted service, he was not bound to repudiate anything she had done. No adverse inference from his silence upon this subject is proper; for, as the record shows, he was then not fully informed of what had transpired during his absence, and it is not to be inferred that he was guilty of double dealing, as counsel for defendant seem to think, because he refused to agree to anything, or because he kept silent.

Nor did he ratify the act of Miss Bennett by obtaining the order of November 7th. He did not rely upon the stipulation made by Miss Bennett on November 4th and get an extension of time, but, so far as the record shows, obtained the grant of time upon the theory that the new trial proceedings had lapsed entirely, and in order that, if he should be mistaken, a correct

record of the case might still be made. This is apparent from the fact that he had the order made without prejudice and with the reservation of all his rights to object on all grounds, not only to the settlement of the statement, but to the granting of a new trial. It is apparent, also, that counsel for defendant two days later did not regard anything said on November 5th, or the obtaining of this order on the 7th, as a waiver of anything; for they submitted the statement for settlement as if the service made on October 21st was sufficient, and the main contention at the time of the settlement was whether, in fact, Miss Bennett was Mr. Gormley's clerk.

The mode of procedure in the settlement of statements and bills of exception, where the service has not been timely, is discussed at length in *Beach v. Spokane Ranch & Water Co.*, 25 Mont. 367, 65 Pac. 106, with citation of cases decided by this court as well as by the California court. It is there held that it is proper for the judge, upon presentation of the statement for settlement, when objection is made that service has not been timely, either to decline to settle it, or settle it after incorporating in it the objections with the matter offered in support of the objections, and also anything to show waiver on the part of the objecting party, if a waiver is alleged; and that if it appears that service has been out of time and there has been no waiver, the motion should be denied. It is also held that the mere form of the expression or language in which the objections are couched is unimportant, provided it clearly appears what the objections are. The same rule must, perforce, apply where there has been no service at all, as was the case here; and we think with reference to the order of November 7th the same rule should apply.

It is clear that it was the intention of Mr. Gormley not to waive anything. The fact that he obtained time can no more be treated as a waiver than may an appearance of counsel under the same circumstances, at the settlement of the statement or at the hearing of the motion, provided at each step, prior to such appearance, he preserves his right to object; and the matter

showing an alleged waiver must show it clearly by a preponderance of the evidence, for the burden is upon him who alleges a waiver to show it by clear and satisfactory proof. This proof counsel for defendant say is in the record in the form of the reservation contained in the preface to the proposed amendments, in the clause "and plaintiff hereby reserving his right to make any and all objections because of the defendant's failure to serve and file said statement in time," etc. If this clause be treated as containing the only reservation made, of course then the defendant is right; but the preceding reservations may not be overlooked. The whole accompanying statement must be taken together and the meaning gathered from it as a whole. Also the reservation following the amendments must be looked to. Taking them all together, the purpose is manifest to reserve the right to object on all grounds, for counsel say "without waiving any right to object on the ground that no legal, timely, or sufficient service was made." And the concluding sentence following the amendments contains the language: "The foregoing amendments are proposed with the reservations and objections first above mentioned." It is not only in the plural, referring to all the objections mentioned in the preface, but refers in terms to those "first above mentioned," showing clearly the intention of Mr. Gormley not to waive any of the objections mentioned in the preface.

It is argued by counsel for defendant that the district court found upon conflicting evidence against the contention of the counsel for plaintiff, and that its finding thereon may not be disturbed. From our point of view the evidence gives room for but one inference, and this supports the contention of plaintiff.

We are of the opinion that the contention of counsel for plaintiff must be sustained; that no service of the statement was ever made, and that counsel for defendant has failed to sustain the burden of showing that this lack of service was waived by any act done by Mr. Gormley. The court should have denied the motion on the ground that the statement was not before it. This conclusion disposes of the legal questions urged with a great

deal of force and plausibility in the brief of counsel; that the court erred in refusing to direct a nonsuit at the close of plaintiff's testimony, and in refusing to direct a verdict for the defendant at the close of the whole case.

The other errors assigned in the brief challenge the correctness of the action of the court in submitting certain instructions to the jury and in refusing to submit others requested by the defendant. Upon careful attention to these, however, we fail to perceive that the court committed any prejudicial error. The instructions submitted fully and fairly cover all the issues in the case and, we must presume, were justified by the facts before the court in the evidence. The criticisms of some of them are not well founded, and of others are exceedingly technical. For illustration we refer to paragraph 8 of the charge: "The burden of proving by a preponderance of the testimony that the defendant was negligent in the particulars charged in the complaint, and that the injury to the plaintiff was the direct result of such alleged negligence, is upon the plaintiff, Nord. The burden is upon the defendant to show by a preponderance of the testimony that the plaintiff was guilty of contributory negligence at the time of the accident, and likewise to show that plaintiff assumed the risks and danger of the accident complained about." It is said of it that it imposed upon the defendant, in order to escape liability, the burden of proving both the defenses, contributory negligence and assumption of risk, whereas it would have been sufficient to establish either. If the paragraph should be read apart from the rest of the charge, this criticism might, perhaps, be just, but, reading the charge as a whole, we do not think the jury could possibly have misunderstood that their verdict should be for the defendant in case either defense was established by a preponderance of the evidence.

It is also said of it that it is erroneous in that it cast upon the defendant the burden of proof as to either of these defenses. So far as concerns the defense of contributory negligence, this criticism is based upon the defendant's theory of the case that

the injury appears to have been caused proximately by the plaintiff's own act, and the rule stated as the correct one in *Kennon v. Gilmer et al.*, 4 Mont. 433, 2 Pac. 21, and approved in *Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871, and other cases, is invoked. The present case, however, does not fall within the rule of these cases; at least, the pleadings do not bring it within the rule; and, as the facts shown by the proof are not before the court, we are not informed as to what the situation presented by them was. Except in the class of cases of which *Kennon v. Gilmer*, *supra*, is a type, the rule in this state is that contributory negligence is an affirmative defense, and the burden of establishing it by a preponderance of the evidence rests upon the defendant. (*Ball v. Gussenhoven*, *supra*, and cases cited.) The same rule applies to the defense of assumption of risk. (1 Thompson on Negligence, 368.)

Most of the instructions requested and refused were formulated on defendant's theory of the case, and, upon the record before us, were properly refused. The others refused are fairly embodied in those given; there was, therefore, no error in refusing them.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

ON MOTION FOR REHEARING.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Appellant has submitted a petition for a rehearing herein, in which contention is made that the conclusions of the court are wrong, for the reasons (1) that it makes an erroneous application of the law of agency, and (2) that its construction of the language used by counsel of defendant in reserving his right to object to a settlement of the statement on motion for a new trial is clearly unwarranted.

1. In support of the first contention counsel says that the statement in the opinion that "one dealing with a supposed agent must ascertain at his peril whether in fact the supposed agency exists," embodies a principle not applicable to the facts of this case, because Miss Bennett having earlier in the year actually been the clerk of Mr. Gormley, counsel was entitled to treat her as still in the employ of Mr. Gormley until notified of her discharge. He cites sections 3150 and 3151 of the Civil Code, which lay down the rule that an agency is effectively terminated or the power of the agent revoked as to third persons only when notice has been given to them. These sections are but declaratory of the common-law rule, but they have no application to this case.

Miss Bennett was never the agent of Mr. Gormley for any purpose, so far as the record shows, except to receive service of papers while she was in his employ and in his office or in charge of it. She had no power to enter into stipulations for him for any purpose, and, under the express terms of the statute pointing out how constructive service may be made (Code of Civil Procedure, section 1831), she had not any authority whatever except during office hours, or, at any rate, while she was engaged in her duties in the office. Strictly speaking, she was, under the statute, but the passive agent by virtue of her employment to receive and acknowledge service in the office. She could not do anything actively to bind her employer. At the time of the alleged service she was not in the office nor in charge of it. Therefore, under any circumstances, her power to bind Mr. Gormley, if it existed at all, existed by virtue of some other relation than her employment as his clerk. So that, when Mr. Cooper came to deal with her in the "Democratic headquarters," in another building across the street, he did so with full knowledge that she was not Mr. Gormley's agent for the purpose of the business then in hand, unless specially authorized to transact it, and therefore he was bound at his peril to ascertain whether in fact she was so authorized.

Again: It is contended that the construction thus given section 1831, *supra*, is entirely too narrow and technical, and that the phrase "by leaving the notice or other paper with his clerk therein," should be construed to mean "by leaving the notice or other paper with a clerk employed by him." By the plainest rule of construction we think the phrase must be given the meaning we have given it in the original opinion, for evidently the purpose of the statute is that when service is made upon a clerk, the paper served must be left in the office and not elsewhere. This seems so clear as to leave no room for controversy.

2. As to the second contention, we deem it unnecessary to add anything to what has already been said. The construction of the language of the order of November 7th and of the statement of reservations accompanying the amendments, we think is fair and reasonable, and excludes the idea of waiver by Mr. Gormley or his ratification of anything done by Miss Bennett. A rehearing is denied.

Denied.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

BEASLEY, APPELLANT, v. BERRY ET AL., DEFENDANTS;
BERRY, RESPONDENT.

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140	108

(No. 2,225.)

(Submitted January 11, 1906. Decided February 10, 1906.)

Partnership—Employee Sharing Profits—Appeal.

Appeal—New Trial—When Order Granting will be Affirmed.

1. Where the order sustaining a motion for a new trial is general, it will not be disturbed on appeal if it can be sustained upon any ground of the motion.

Partnership—Employee Sharing Profits.

2. The mere fact that an employee, engaged to buy and handle sheep for his employer, to purchase feed for them and generally to have charge of the latter's business, was to receive one-third of the profits,

in addition to a fixed compensation of \$75 per month, did not constitute him a partner, where it appeared that the business was carried on in the employer's name, by whom all funds were furnished, and who had never permitted himself to be held out as a partner with the employee.

Partnership—Sharing Profits.

3. While the sharing of profits is some evidence that a partnership exists, it is not conclusive proof of it.

Appeal from District Court, Sweet Grass County; Frank Henry, Judge.

ACTION by W. W. Beasley against Ralph Berry and C. R. McDaniels. Plaintiff had judgment. Defendant Berry moved for a new trial, and from an order granting such motion plaintiff appeals. Affirmed.

Mr. A. G. Hatch, for Appellant.

The Code definition of a partnership is the same as is given by Parsons, by Story and by Kent (Parsons on Partnership, 6; Story on Partnership, sec. 2; 3 Kent's Commentaries, 23), and while the parties associating themselves may not declare it a partnership, the court will declare the legal effect of the agreement. (*Kelly v. Bourne*, 15 Or. 476, 16 Pac. 43.) A contract of partnership is where parties join together their money, goods, labor or skill, for the purpose of trade or gain and where there is a community of profits. (*Ward v. Thompson*, 63 U. S. (22 How.) 330, 331, 16 L. Ed. 249; *O'Donohue v. Bruce*, 92 Fed. 858, 35 C. C. A. 52; *In re Beckwith & Co.*, 130 Fed. 475.) As to liability of partners in nontrading partnership, see Lindley on Partnership, 2d Am. ed. (Ewell), 361; *McDonald v. Clough et al.*, 10 Colo. 59, 14 Pac. 121; *Manville v. Parks et al.*, 7 Colo. 128, 2 Pac. 212; Greenleaf on Evidence, 13th ed., sec. 485. The general principle which lies at the foundation of a partner's liability is that every partner has full and absolute authority to bind all the partners by his acts or contracts in relation to the business of the firm, in the same manner and to the same extent as if he had full powers of attorney from all of the members.

(*Manville v. Parks*, 7 Colo. 128, 2 Pac. 212; *Hefferlin et al. v. Karlman et al.*, 29 Mont. 146, 74 Pac. 201.)

Mr. E. M. Hall, for Respondent.

Evidence showing nothing more than the mere sharing of a certain portion of the profits is not sufficient proof to sustain an allegation of partnership, where the same is denied in the answer. (*Parchen et al. v. Anderson*, 5 Mont. 438, 51 Am. Rep. 65, 5 Pac. 588.) See, also, George on Partnership, pp. 37, 38, 43, for a full discussion and citation of authorities on profit-sharing as evidence of partnership. (*Hunter v. Conrad*, 18 Mont. 183, 44 Pac. 523; *Omaha & Grant Smelting Co. v. Rucker*, 6 Colo. App. 334, 40 Pac. 853; *Buttler v. Hinkley*, 17 Colo. 523, 30 Pac. 252; *Porter v. Curtis*, 96 Iowa, 539, 65 N. W. 824; *Appeal of Hamper*, 51 Mich. 71, 16 N. W. 236; *Quackenbush v. Sawyer*, 54 Cal. 441; *Prince v. Lamb*, 128 Cal. 126, 60 Pac. 689; *Coward v. Clanton*, 122 Cal. 454, 55 Pac. 147.) The testimony shows that Berry and McDaniels were not partners in fact. If not partners in fact, the plaintiff must prove that Berry, either intentionally or by want of ordinary care, so acted as to make him liable as a partner to third persons. (*Buttler v. Hinkley*, 17 Colo. 523, 30 Pac. 252; *Harris v. San Diego Flume Co.*, 87 Cal. 528, 25 Pac. 758; *Robinson v. Nevada Bank*, 81 Cal. 109-113, 22 Pac. 478; *Rodgers v. Peckham*, 120 Cal. 238, 52 Pac. 483.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1901 W. W. Beasley and Nat C. Beasley were copartners engaged in the live stock and commission business in Sweet Grass county. There was a dissolution of the firm and W. W. Beasley succeeded to all of its interests. This action is brought by W. W. Beasley, successor of W. W. Beasley & Son, to recover certain commissions alleged to have been earned by the firm for services performed under contract with Ralph Berry and C. R.

McDaniels, who, it is alleged, were at the time the contract was made partners engaged in handling sheep.

There appears to have been no service upon defendant McDaniels. Defendant Berry answered denying all the material allegations of the complaint. A verdict was rendered in favor of plaintiff and judgment entered thereon. Defendant Berry moved for a new trial, which was granted, and from the order granting it plaintiff appealed. One of the grounds of the motion for a new trial is insufficiency of the evidence to show that a partnership existed between Berry and McDaniels, or that Berry had ever permitted himself to be represented as a partner of McDaniels. The statement on motion for new trial specified other alleged errors, but the foregoing will be sufficient for our consideration.

The order sustaining the motion for a new trial is a general one, and it will not be disturbed if it can be sustained upon any ground of the motion. (*Gillies v. Clark Fork Coal M. Co.*, 32 Mont. 320, 80 Pac. 370.)

The contract sued upon, if made at all, was made with McDaniels. There is no pretense that Berry knew anything about it, that he ever permitted himself to be held out as a partner with McDaniels, or that he ever ratified what McDaniels had done. Respecting the existence or nonexistence of any partnership relation between Berry and McDaniels, the evidence is, that Berry employed McDaniels to buy and handle sheep for him, to rent ranches to winter them on, to buy feed for them, and generally to have charge of the business under Berry's directions. McDaniels' compensation was fixed at \$75 per month and one-third of the profits, if any, of the business. Berry's explanation of this arrangement is that McDaniels was an experienced sheepman whose services were worth more than \$75 per month, and therefore the allowance of one-third of the profits, if any, was made.

Plaintiff offered testimony to the effect that McDaniels had represented that he and Berry were partners *in the profits of the business*. McDaniels denies that he made such representa-

tions, but does not deny that he was to receive one-third of the profits of the business as a part of his compensation. Both Berry and McDaniels deny that they were partners. There is a direct conflict in the evidence as to whether McDaniels made the contract the breach of which is made the occasion for bringing this action. The proof does show that the business was carried on in Berry's name, that all funds were furnished by Berry, and that McDaniels did not have any interest in the business as such.

Appellant relies upon section 3180 of the Civil Code, which is as follows: "Partnership is the association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them"; and contends that the facts disclosed above, with reference to which there is not any controversy, show that Berry and McDaniels were partners as defined above. In other words, it would seem that appellant contends that the sharing of profits is made the conclusive test of a partnership. The next succeeding section of the Code, however, provides that "a partnership can be formed only by the consent of all the parties thereto * * *."

Section 3191 provides that "the interest of each member of a partnership extends to every portion of its property." Section 3240 provides that "all profits made by a general partner, in the course of any business usually carried on by the partnership, belong to the firm." Section 3253 provides that "no one is liable as a partner who is not such in fact," except as provided in section 3252, which reads: "Anyone permitting himself to be represented as a partner, general or special, is liable as such to third persons to whom such representation is communicated, and who, on the faith thereof, give credit to the partnership."

It is not contended that Berry permitted himself to be represented as a partner with McDaniels and therefore he is not liable as a partner unless he was such in fact.

Does section 3180 above make the mere sharing of profits the decisive test of a partnership? That it does not do so is

apparent. Under the very next section of the same Code the consent of Berry was necessary to the formation of a partnership, and there is a total failure of proof of any such intention on his part, while the proof does show a contrary intention. When sections 3180, 3191, 3240 and 3253 above are considered together, the meaning of section 3180 is made plain. In order to constitute Berry and McDaniels partners, in addition to the mere sharing of profits, if any, they must have associated themselves for the purpose of carrying on the business together; that is, the business must have been partnership business; the funds for investment, partnership funds; the property purchased, partnership property; and the profits, if any, partnership profits.

Of course, one partner may contribute funds and another labor; but when the funds are set apart for the purpose, they become partnership funds. The very nature of a partnership excludes the idea of master and servant or employer and employee.

The sharing of profits is some evidence that a partnership exists, but it is not conclusive proof of it. The mere fact that an employee receives as his wages, in whole or in part, a percentage of the profits of the business in which he is engaged, does not of itself constitute him a partner.

The views herein expressed coincide with those of the supreme court of California, under a Code definition of a partnership identical with our own (California Civil Code, section 2395; *Cowan v. Clayton*, 122 Cal. 451, 55 Pac. 147), and with the general views expressed in modern decisions and in textbooks. (*Pierpont v. Lauphere*, 104 Ill. App. 232; *Padgett v. Ford*, 117 Ga. 508, 43 S. E. 1002; *Bauer v. Wilson et al.* (Tex. Civ. App.), 79 S. W. 364; *Altgelt v. Alamo Nat. Bank* (Tex. Civ. App.), 79 S. W. 582; *Texas & P. Ry. Co. v. Smissen et al.*, 31 Tex. Civ. App. 549, 73 S. W. 42; *Glore v. Dawson*, 106 Mo. App. 107, 80 S. W. 55; *Gentry v. Singleton* (C. C. A.), 128 Fed. 679; *Dawson Nat. Bank v. Ward*, 120 Ga. 861, 48 S. E. 313; *Portier v. Curtis*, 96 Iowa, 539, 65 N. W. 824; *Holbrook v. Oberne*,

56 Iowa, 324, 9 N. W. 291; *Kootz v. Tuvian*, 118 N. C. 393, 24 S. E. 776. See, also, 22 Am. & Eng. Ency. of Law, 31, and cases cited; 2 Current Law, 1107; 4 Current Law, 909.)

In the absence of any showing that Berry knew anything about the representations made by McDaniels, if any were made, that he ever represented McDaniels as his partner, had ever permitted himself to be held out as such, or ever ratified McDaniels' contract with Beasley & Son, if any was made, the decisive test as to whether a partnership actually existed was one of intention of the parties—an intention to carry on the business together and share the profits as joint owners of the partnership property. (George on Partnership, 53.) The question of agency independently of the partnership is not presented.

In view of the evidence disclosed by this record and what has here been said, it was not error for the district court to grant the motion for a new trial, and the order is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

BUCKLEY, APPELLANT, v. McDONALD, RESPONDENT.

(No. 2,211.)

(Submitted January 6, 1906. Decided February 10, 1906.)

Election Contests—Citizenship—Aliens—Findings—Presumptions—Burden of Proof—Constitution.

Election Contests—Citizenship—Burden of Proof.

1. In an election contest the burden rests upon the party challenging the eligibility of a person to an office on the ground that he is an alien, to prove the fact of his alienage by a preponderance of the evidence; and where the district court, while not making a formal finding in that regard, in a written opinion stated, "if the fact of the nativity of contestee can be definitely found from the evidence,"

it was apparent that the contestant had failed to sustain this burden and the judgment should have been against his contention.

Election Contests—Citizenship—Presumptions.

2. The presumption will be indulged that the father of contestee in an election contest in which the nativity of the latter was at issue, was a citizen of the United States, where it was found that the former at the time of contestee's birth resided in a city within this country.

Election Contests—Citizenship—United States Merchant Marine Service—Presumptions.

3. Where, in an election contest in which the contestee's citizenship at the time of his election was in question, it was found that his father had been a captain in the merchant marine service of the United States, it must be presumed that the latter was a citizen of the United States, since under the Revised Statutes of the United States, section 4131, only citizens could act as officers of vessels engaged in the commerce of the United States.

Election Contests—Citizenship.

4. The conclusion of the district court that the contestee—in an election contest in which his eligibility was attacked upon the ground of his alienage—who came to the United States at the age of fifteen, was a citizen of the United States no matter where born, was, under Revised Statutes of the United States, section 1993, correct, it having been found that his father was at the time of the son's birth a resident of Boston, Massachusetts, and continued to reside there until his death, and was also a captain in the merchant marine service of the United States.

Election Contests—Citizenship—Constitution.

5. The fourteenth amendment to the constitution of the United States declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof" are citizens, is not exclusive as a definition of citizenship, but declaratory of the rights existing under the law at the time of its adoption and as affirmative of them, and has no application to acquisition of citizenship by birth in foreign lands of parents who were American citizens.

Appeal from District Court, Chouteau County; Jere B. Leslie, Judge.

ELECTION contest by John Buckley against Frank McDonald, sheriff-elect of Chouteau county. From a judgment in favor of contestee, the contestant appeals. Affirmed.

Mr. W. S. Towner, and Mr. Thos. E. Brady, for Appellant.

When appellant's proof had established the fact of respondent's birth in a foreign country, the burden immediately shifted upon the respondent to establish the fact that he came within the exception to the general rule that he was born of American parents, but the trial court in this case practically held that it

was a duty of the appellant, both to allege and prove the lack of citizenship of the ancestry of respondent in order to preclude the possibility of the respondent coming within this exception. Such is not the rule. (5 Am. & Eng. Ency. of Law, p. 42, note 1; *Beardstrom v. Virginia*, 76 Ill. 34; *Vigus v. O'Bannon*, 118 Ill. 334, 8 N. E. 778; *Delachaise v. Maginnis*, 44 La. Ann. 1043, 11 South. 715.) The original status of an alien, when once established, is presumed to continue until the contrary appears. Hence proof of foreign birth casts the burden of proving citizenship in a nation wherein the individual may reside. (*Hauenstein v. Linham*, 100 U. S. 483, 25 L. Ed. 628; *People v. Pease*, 27 N. Y. 45; *Fay v. Taylor*, 3 Misc. Rep. 32, 63 N. Y. Supp. 572; *Nalle v. Fenwick*, 4 Rand. (Va.) 585; *Chas. Green's Son v. Salas*, 31 Fed. 106; *White v. White*, 2 Met. (Ky.) 185; *Kadlec v. Pavik*, 9 N. Dak. 278, 83 N. W. 5; *Walther v. Rabolt*, 30 Cal. 185; *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182; *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704.)

Mr. George H. Stanton, Mr. Charles V. Pray, and Mr. J. A. McDonough, for Respondents.

Foreign-born children of a citizen are themselves citizens, and, in the application of this rule, it is wholly immaterial whether the father is a citizen by birth or by naturalization. (*Oldtown v. Bangor*, 58 Me. 353; *State v. Adams*, 45 Iowa, 99, 24 Am. Rep. 760; *Charles v. Monson etc. Mfg. Co.*, 17 Pick. (Mass.) 70; *Ludlam v. Ludlam*, 26 N. Y. 356, 84 Am. Dec. 193; *Albany v. Derby*, 30 Vt. 718; *Ware v. Wisner*, 50 Fed. 310; *Wolff v. Archibald*, 14 Fed. 369, 4 McCrary, 581; *Campbell v. Wallace*, 12 N. H. 362, 37 Am. Dec. 219-224.) The rule is well settled that in the absence of proof to the contrary, every man is considered a citizen of the country in which he may reside. (*Jantzen v. Arizona Copper Co.*, 3 Ariz. 6, 20 Pac. 93; *Coze v. Gulick*, 10 N. J. L. 328; *Sharon v. Hill*, 26 Fed. 337.) The law presumes all persons who reside in the United States to be citizens thereof. (*State v. Beackmo*, 6 Blackf. (Ind.) 488; *Behrens-*

meyer v. Kreitz, 135 Ill. 591, 26 N. E. 705.) Alienage must be proved by the person who asserts it. (*Moore v. Wilson*, 18 Tenn. (10 Yerg.) 406; *Gilman v. Thompson*, 11 Vt. 643, 34 Am. Dec. 714; *Jones v. McCoy*, 3 Tex. 349.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This appeal is from a judgment rendered in an election contest involving the title to the office of sheriff of Chouteau county. At the general election in the year 1904, the appellant and respondent were, respectively, the candidates of the Democratic and Republican parties for the office in question. The appellant received 1053 and the respondent 1305 votes, as was shown by the official canvass. The respondent having received a certificate of election, the contest was instituted by the appellant under sections 2010 et seq. of the Code of Civil Procedure. The ground of the contest is that the respondent was on November 8, 1904, the date of the election, ineligible to hold the office, in that he was not at that time a citizen of the United States, and that he was not such at the date of the commencement of the contest, he having been born in a foreign country and not having become naturalized under the laws of the United States. Upon an issue made upon this allegation, the district court found for respondent.

Upon the record before us it is doubtful whether the merits of the appeal should be considered, for the reason that it does not appear that formal judgment has been entered in the case, or, if such is the fact, that it is incorporated in the judgment-roll. What purports to be the judgment is in fact the opinion of the district judge embodying his views as to what persons are citizens of the United States, with a citation of authorities. It is not in the form of a judgment. Since, however, its concluding paragraph declares the respondent entitled to the office and to recover his costs, the parties seem to have treated it as the formal judgment. No point is made by the respondent

in this regard. We therefore take the record as it is and determine the question presented upon its merits. It is doubtful, also, whether the complaint states a cause of action. We shall not pause to consider whether it does or not.

The district court made no formal findings. In the opinion filed by the judge he makes this remark: "It is sufficient to say that the preponderance of the evidence in this case warrants the finding of fact, if the fact of the nativity of contestee can be definitely found from the evidence, that he was born on Prince Edward Island and without the jurisdiction of the United States." We are of the opinion that this statement does not amount to a finding of fact, as is claimed by appellant, because if the phrase "if the fact of the nativity of contestee can be definitely found from the evidence," indicates anything, it indicates a conviction that the evidence is not sufficient to warrant a finding one way or the other upon this point. If this be the correct view of the meaning of the learned judge, the respondent was entitled to judgment, for, the appellant having challenged the eligibility of respondent on the ground that he is an alien, the burden was upon him to prove the fact of his alienage by a preponderance of the evidence, and if, upon the whole case, he did not sustain the burden, the decision and judgment should have been against his contention.

We are of the opinion that the evidence was not sufficient to support a finding that the respondent is of foreign birth. But be this as it may, the court based its decision and judgment upon the fact which, it is apparent, it found from the evidence that at the time of the respondent's birth, in 1872, his father was a resident of Boston, Massachusetts, and continued to reside there until he died, in 1893, and was also a captain in the merchant marine service of the United States. This fact having been found, it was concluded that the son, who came or returned to the United States from Prince Edward Island, where he spent the early years of his life, at the age of fifteen and has resided here since, is, under the law, a citizen of the United States, whether born on Prince Edward Island or upon the soil

of the state of Massachusetts. Whether this conclusion is correct is the question submitted for decision.

The residence of the father being found to have been in Boston, Massachusetts, the presumption must be indulged that he was a citizen of the United States. (*Garfield M. & M. Co. v. Hammer*, 6 Mont. 53, 8 Pac. 153; 7 Cyc. 147, and cases cited.) And this presumption is strengthened by the fact that he was a captain in the merchant marine service, for, under the law, being an officer of a vessel engaged in the commerce of the United States, he must have been a citizen of the United States. (U. S. Rev. Stats., sec. 4131 [U. S. Comp. Stats. 1901, p. 2803].)

What, then, is the status of the son under the provisions of the Fourteenth Amendment to the Constitution of the United States and the Acts of Congress? Section 1993, Revised Statutes of the United States (U. S. Comp. Stats. 1901, p. 1268), provides: "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States, but the rights of citizenship shall not descend to children whose fathers never resided in the United States." This is an express declaration of Congress fixing the status of children born in foreign countries whose fathers were at the time of their birth citizens of the United States; and this must be held conclusive of the rights of respondent in this case, unless the Fourteenth Amendment to the Constitution of the United States, wherein it is declared that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside," declares otherwise. A casual reading of this declaration would lead to the conclusion that it is exclusive as a definition of citizenship, and that only persons born or naturalized in the United States and subject to the jurisdiction thereof, are entitled to the rights of citizenship. This portion of the amendment was considered by the supreme court of the United States in the case of *United States v. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. 456, 42

L. Ed. 890, and its general scope and meaning declared. It is there pointed out that it is to be interpreted as declaratory of the rights existing under the law at the time of its adoption and as affirmative of them, and that it has no application to acquisition of citizenship by birth in foreign lands of parents who were American citizens. The court said: "This sentence of the Fourteenth Amendment is declaratory of existing rights, and affirmative of existing law, as to each of the qualifications therein expressed—'born in the United States,' 'naturalized in the United States,' and 'subject to the jurisdiction thereof'—in short, as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States. But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish a uniform rule of naturalization."

This statement of the court was not altogether pertinent to the case before it for decision, but the whole subject of citizenship is elaborately discussed, with a review of all the decided cases upon the subject by the American and English courts and the decisions of the state department, and we are of the opinion that its conclusion must be considered as an authoritative one.

The judgment of the district court was therefore correct and must be affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE MILBURN: The definition of "citizen" in the Federal Constitution being, I think, so simple and easily understood, and the opinions of the federal supreme court, of the federal state department (under international law), and of text-writers being so numerous and labored and to me confusing, I hesitate to express an opinion at this time, as to what constitutes citizenship. I therefore content myself with merely concurring in the result reached without concurrence in the opinion.

STATE, RESPONDENT, v. KOCH, APPELLANT.

(No. 2,214.)

(Submitted January 13, 1906. Decided February 19, 1906.)

*Criminal Law — Manslaughter — Instructions — Constitution — Jury Trial.**Criminal Law—Instructions—Jury Trial—Constitution.*

1. Where defendant in a prosecution for murder pleads "not guilty," an instruction to the jury to the effect that they could find him guilty of murder in either of its degrees, or of voluntary or involuntary manslaughter, but "you cannot find him not guilty," is in contravention of defendant's constitutional right (Constitution, Article III, section 16) to have the question of his guilt or innocence determined by a jury, of which right he cannot be deprived no matter how clear and unimpeached or free from suspicion the evidence may be.

Same—Jury Trial.

2. *Obiter*: The constitutional guaranty that in all criminal prosecutions the accused shall have the right to a trial by jury (Constitution, Article III, section 16) includes misdemeanors as well as felonies.

Same—Trial—What Constitutes.

3. The word "trial" as used in section 16, article III, of the Constitution, embraces all proceedings in the progress of a criminal prosecution after the issues are made up, down to and including the rendition of the verdict.

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

HARRY KOCH was convicted of voluntary manslaughter. He appeals from the judgment and an order denying him a new trial. Reversed.

Mr. Albert J. Galen, Attorney General, and Mr. W. H. Poorman, Assistant Attorney General, for Respondent.

By the instruction complained of (No. 29), the court, in effect, advised the jury to find the defendant guilty of murder in the first degree, murder in the second degree, voluntary manslaughter or involuntary manslaughter.

The evidence on the part of the state clearly established the commission of the offense charged, and the defendant in his

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testimony admits all the facts established by the state but denies that he intended to commit the homicide. The only question of fact in dispute was the criminal intent, but the jury found the defendant guilty of an offense which does not involve intent; hence as to the offense named in the verdict, there was no dispute whatsoever, and the admissions of defendant in his testimony are in effect a plea of guilty as to such offense, and the jury could not ignore this evidence on the part of the state and the admissions of defendant, nor refuse to convict thereon without a palpable violation of its sworn duty. It was not error for the court to call the attention of the jury to its sworn duty. The court did not direct a verdict of guilty as to any specific offense or degree, but in effect advised the jury that on the evidence in the case admitted by the defendant, it was its duty to convict of homicide in some degree, regarding manslaughter as a degree of homicide, leaving the jury to determine the degree. (See *People v. Neumann*, 85 Mich. 98, 48 N. W. 290; *People v. Collison*, 85 Mich. 105, 48 N. W. 292.)

Had the defendant or anyone else testified or given it as his opinion that he did not fire the shot, or that he did not kill the deceased, or that he did not do any one of the material things necessary to constitute homicide, said instruction 29 would in that case be error. But we submit that under the peculiar facts of this case, said instruction 29 was not error, and that the judgment should, therefore, be affirmed.

Messrs. Huntoon, Worden & Smith, for Appellant.

Instruction 29 is inconsistent with various other instructions given, and cannot be reconciled with them; it is passing upon the evidence and the weight of evidence; it is in effect directing a verdict against the defendant, leaving only the degree of crime to be passed upon by the jury, thus depriving the defendant of his constitutional right and of his rights under the Codes of the state of Montana to have a jury pass upon the facts of the case for which he is being tried; and it is in itself erro-

neous as usurping the powers of the jury to find the facts in all criminal cases.

Instructions which are misleading, inconsistent and irreconcilable with others given in the case are presumed to have worked prejudicial error in the trial of the case and to have worked injury to the defendant. (*State v. Shadwell*, 26 Mont. 52, 66 Pac. 508; *State v. Sloan*, 22 Mont. 305, 56 Pac. 364; *State v. Rolla*, 21 Mont. 582, 55 Pac. 523; 2 Thompson on Trials, sec. 2326, and cases cited.)

The court has no power to direct a verdict of guilty where the defendant has entered a plea of not guilty, no matter how clear and unimpeached the evidence may be. (2 Thompson on Trials, sec. 2149, and cases cited.) An erroneous instruction is presumed to have worked injury to the defendant. (*State v. Johnson*, 26 Mont. 9, 66 Pac. 290; *State v. Mason*, 24 Mont. 346, 61 Pac. 861.) Any expression of the court's opinion upon the evidence as expressed in instructions or fairly inferable from them, upon the weight of evidence is prejudicial error from which a new trial will be granted. (*People v. Matthai*, 35 Cal. 442, 67 Pac. 694; *State v. Fisher*, 23 Mont. 555, 59 Pac. 919; *Edgar v. State*, 43 Ala. 312; *Foster v. State*, 47 Ala. 643; 2 Thompson on Trials, sec. 2420.) All issues of facts in criminal cases must be tried by a jury. (Pen. Code, secs. 1991, 2105.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant was by information charged with the crime of murder. Upon his plea of not guilty he was tried and found guilty of voluntary manslaughter and sentenced to a term of ten years in the state prison. He has appealed from the judgment and an order denying him a new trial.

The circumstances attending the homicide are the following: On February 15, 1904, the date of the homicide, the defendant and three others were engaged in a game of cards in a saloon owned and conducted by one Joseph D. Vander, in the

village of Stanford, Fergus county. The play had begun early in the morning and had continued until about 2 o'clock in the afternoon. A "treat" went with each game. During the day, beginning before breakfast, the defendant had been drinking, and at the time of the killing was somewhat intoxicated. A short time before 2 o'clock Vander and one Louis Seguin began playing the same game at another table near by, Vander sitting just back of the defendant with his face in the opposite direction. Other persons were present, to the number of perhaps a dozen, looking on. Presently Vander turned in his chair, called the attention of the defendant to the hand he (Vander) held and asked him whether it was good for four points. After looking at it the defendant said it was. Vander bantered him to play it against Seguin. The defendant finally bet \$20 with Seguin that he could make four points with it, and took and played it against Seguin's hand, but lost. Seguin took the money. Immediately thereafter there was considerable talk among those present as to the value of the hand, and whether it was possible, if played against one who understood the game and holding Seguin's hand, to make four points with it. It was in fact a trick hand dealt to catch and fleece the unwary. Having learned that he had been defrauded of his money, defendant became angry. He accused Vander of taking part in the fraud, and finally became so affected by his feelings that he wept. Some of the state's witnesses testify that he repeatedly threatened to get even with or kill some of those who had robbed him. However, after the lapse of "some minutes" he left the saloon, went across the street to his hotel, obtained his rifle and came back, pumping a cartridge into the chamber as he approached the saloon. Upon entering he saw no one there, the proprietor and the others who had been present having left because they anticipated trouble. The saloon proper consisted of one large room in front, with the bar at the left near the front door. At the rear were two other rooms in a lean-to, built of logs, into which access was obtained by doors leading from the saloon. One room was used for a coalshed, the other for a

bedroom. Two of the persons present had gone into the bedroom; two others, Vander and one Geer, had gone into the coalshed. The doors of both of these rooms were closed. The others who had been present, except one Leroy and one Simpson, had gone to another saloon about fifty feet down the street. Of the latter, Leroy was standing on the sidewalk in front of the building, and Simpson was inside near the bar; whether he was concealed behind the bar the evidence does not show. Upon entering and finding no one in the room, the defendant partially raised the rifle and fired it through the door into the coalshed, almost instantly killing Vander, who happened to be in range beyond the door. There is some evidence tending to show that the instant before the shot was fired Vander opened the door of the coalshed slightly and looked to see what the defendant was doing. After the shot was fired the defendant started to go out, but, observing a bottle on the bar, struck it with his rifle, breaking it and saying that it was the cause of his trouble. He thereupon went to the other saloon where, after firing his rifle again, he was overpowered and arrested. He says that he was then informed for the first time, upon inquiry for the reason of his arrest, that he had killed Vander.

The defendant was sworn as a witness. He denied making any threats against Vander, or that he threatened to kill anyone. He denied, also, that he knew that Vander or anyone else was in the coalshed at the time he fired the rifle into it, and also that he entertained any ill-will toward Vander. He stated that his purpose in getting the rifle was to "bluff" the man who got his money, and that, though he had been drinking during the day, he was perfectly conscious of what he was doing. In other respects the story of the tragedy as told by him agreed throughout with the detailed statements of the state's witnesses. There was evidence that the previous character of the defendant for peace was good.

Upon these facts the court, among other instructions, submitted to the jury the following: "Under the charge contained in this information you may find the defendant guilty of mur-

der in the first degree, murder in the second degree, or you may find him guilty of voluntary manslaughter or of involuntary manslaughter, but you cannot find him not guilty." While other errors are assigned upon the instructions, they are based upon alleged conflicts and inconsistencies arising out of the giving of the foregoing instruction; and for present purposes it will not be necessary to notice them.

The question submitted is, whether or not the paragraph quoted is erroneous, in that it explicitly tells the jury that they cannot, upon the facts detailed by the evidence, acquit the defendant, or, in other words, that they must at any rate find the defendant guilty of involuntary manslaughter.

Contention is made by counsel for defendant that no matter what may be the condition of the evidence, the court may not, in a criminal case, where the defendant has entered a plea of not guilty, direct a verdict. The effect of the instruction, it is said, leaves no option to the jury to find the defendant not guilty of involuntary manslaughter, and to this extent invades the province of the jury by directing a verdict. It is said by the attorney general that it is the province of the court to declare the law and of the jury to find the facts, and that, such being the case, it must follow that whenever, in a criminal prosecution, the facts are admitted or not disputed, and it appears therefrom that the defendant is guilty, the court may direct the jury to render a verdict accordingly, since there is nothing for decision but a question of law; otherwise it must follow that in criminal cases the jury are the judges of both law and facts.

Assuming that the facts set forth above show conclusively that the defendant was guilty of involuntary manslaughter, upon the theory that at the time the shot was fired he was engaged in the commission of an unlawful act, to-wit, disturbing the peace (Penal Code, section 753), does it follow that the court could properly assume that, as a matter of law, he was guilty of involuntary manslaughter? The Constitution declares (Article III, section 16): "In all criminal prosecutions the ac-

cused shall have the right to * * * a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, * * * ." "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." (Id., sec. 29.) The guaranty contained in this provision is general in its terms and of universal application, including misdemeanors as well as felonies, and unless there is some exception by express provision found elsewhere, or some principle of construction by which an exception may be made, it must be construed to mean exactly what it says, and it must follow that the question of guilt or innocence of the defendant must be submitted to, and determined by, the jury, however clear and unimpeached or free from suspicion the evidence may be. There is no exception expressly provided for anywhere in the Constitution, such as that in clear cases wherein the facts are admitted or undisputed, the court may direct a verdict of guilty.

It is true that in section 23 of the same Article it is provided that in prosecutions for misdemeanors the jury in a justice's court shall consist of not more than six persons, and that the right to a trial by jury may be waived in the justice's or district court by default of appearance or by consent in such manner as may be prescribed by law; but even in such cases the right to a trial by such a jury as is provided for therein is guaranteed by section 16, and cannot be taken away.

It is of little importance what significance may be attached to the word "trial" as used in other connections. Manifestly, it is here used in its broadest and most comprehensive sense, and includes all proceedings in the progress of the case after the issues are made up, down to and including the rendition of the verdict. (*State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026.) If this is the correct conclusion as to the meaning of this term, the functions of the court or judge are fully discharged when the case is correctly submitted to the jury and they are left to determine the rights of the defendant. This must be the correct meaning of the term, else we must read into

the section an exception to this effect: "Provided, that in all cases in which the undisputed facts establish the guilt of the defendant, the court may direct the jury to return a verdict of guilty or take the case from the jury and pronounce judgment." In either case the result would be the same, for, whether the court or judge should direct the jury to return a verdict, or take the case from the jury and enter judgment, the determination is made by the court and not the jury.

From these considerations alone it seems to us that in the case at bar the district court clearly invaded the province of the jury. If it be said that this conclusion involves the further conclusion that in all criminal cases the jury are the judges of the law as well as the facts, the only reply proper and possible is that it is this court's province to construe the Constitution as it is, and not by construction to insert in it provisions which the people through their representatives thought it proper to omit.

We are aware that the legislature has declared (Penal Code, section 2105) that upon the trial for any other offense than libel, questions of law are to be decided by the court and questions of fact by the jury, and that, although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are, nevertheless, bound to receive as law what is laid down as such by the court; and that this court has held in the case of *State v. Welch*, 22 Mont. 92. 55 Pac. 927, that where there is a total absence of proof it is the duty of the court to direct a verdict of not guilty. It has nevertheless always been recognized in practice in this jurisdiction, that the jury has power to disregard the law as declared and acquit the defendant, however convincing the evidence may be, and that the court or judge has no power to punish them for such conduct.

The supreme court of Pennsylvania, in the case of *Kane v. Commonwealth*, 89 Pa. St. 522, 33 Am. Rep. 787, in discussing the question as to whether the jury are the judges of both the law and facts, has well said: "The distinction between

power and right, whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has legal power to do anything has the legal right. No court should give a binding instruction to a jury which they are powerless to enforce by granting a new trial if it should be disregarded. They may present to them the obvious considerations which should induce them to receive and follow their instruction, but beyond this they have no right to go. The argument in favor of their taking the law from the court is addressed very properly *ad verecundiam*."

After all, it is of little moment what the theory of courts or the legislatures may be as to the duty of the jury under their oaths. It is well known that in practice they have the power to determine for themselves whether the law as declared by the court is applicable to the facts, and if they acquit the defendant through a mistaken notion that it is not applicable, or out of a total disregard of it, the case is ended for all time; for, under another constitutional guaranty, that no person shall be twice put in jeopardy for the same offense, the court may not set aside the verdict and grant a new trial in such a case.

Nor is it at all to the point that the statute (Penal Code, section 2096) authorizes the court to advise a verdict of acquittal when in its opinion the evidence does not warrant a conviction, or that the court should, when there is a failure of proof, direct such a verdict. (*State v. Welch, supra.*) The converse of this is not the law, as we have seen.

Nor do we know of any respectable authority in which the position here assumed by the attorney general has been upheld in a felony case. In Michigan it has been held that where the defendant is charged with a misdemeanor for the violation of a penal statute, and there is no question of intent, and the evidence permits no inferences about which reasonable men might differ, the trial judge may with perfect propriety state to the jury that the law, applied to the facts which are undisputed, shows the defendant to be guilty of the offense charged, and that it is their duty under the law to so find. (*People v. Neuman*, 85

Mich. 98, 48 N. W. 290; *State v. Ackerman*, 80 Mich. 588, 45 N. W. 367.)

In Pennsylvania it is the rule that the jury are the judges of both the law and the facts, and that it is error for the court to peremptorily instruct the jury in such a way as to take from them the right of deciding the degree of murder. (*Shaffner v. Commonwealth*, 72 Pa. St. 60, 13 Am. Rep. 649.) It was held in the same state, in *Kane v. Commonwealth*, *supra*, that the same rule applies to a prosecution for a misdemeanor for violation of a statute prohibiting the sale of intoxicating liquor on election day.

In the case of *State v. Maine*, 27 Conn. 281, it was held that the defendant may not waive his right to trial by jury under the guaranty of the Constitution, and permit the court to try the question of his guilt or innocence without the intervention of a jury.

So it was held in Alabama in the case of *Huffman v. State*, 29 Ala. 40, that a peremptory instruction to a jury to find the defendant guilty is erroneous, because, although the evidence against the prisoner was undisputed, yet its credibility was a question exclusively for the jury. The same rule was declared in the case of *Nonemaker v. State*, 34 Ala. 211.

Likewise, the supreme court of Georgia, in the case of *Tucker v. State*, 57 Ga. 503, held that notwithstanding the overwhelming evidence of guilt, it was error for the court to charge that the jury should render a verdict of guilty.

In *State v. Picker*, 64 Mo. App. 126, it was declared that a peremptory instruction to find the defendant guilty was a grievous error.

In *Breen v. People*, 4 Park. Crim. Rep. (N. Y.) 380, the court charged the jury that if they found the statements of certain witnesses to be true, it established the larceny by the prisoner. This was held to be error.

So in *Howell v. People*, 5 Hun, 620, the defendant was charged with a violation of the excise law. The court stated to the jury that the evidence against him was uncontradicted and undis-

puted, and directed a verdict of guilty. The supreme court said, in reversing the judgment: "The right to a trial by jury means that the persons indicted are entitled to have the question of their guilt passed upon by the jury. It does not mean that the court is to decide that question and the jury are only to utter the verdict of the court."

The law is so declared by the supreme courts of Kansas and North Carolina, and by the federal courts. (*State v. Wilson*, 62 Kan. 621, 64 Pac. 23, 52 L. R. A. 679; *State v. Winchester*, 113 N. C. 641, 18 S. E. 657; *State v. Riley*, 113 N. C. 648, 18 S. E. 168; *United States v. Taylor*, 3 McCrary, 500, 11 Fed. 470; *United States v. Fenwick*, 5 Cranch C. C. 562, 25 Fed. Cas. 15,087.) In *State v. Riley*, *supra*, the court said: "The plea of not guilty disputes the credibility of the evidence, even when uncontradicted, since there is the presumption of innocence, which can only be overcome by the verdict of the jury. The farthest the court can go in a criminal action is to charge the jury that if they believe the evidence the defendant is guilty."

The text of Thompson on Trials lays down the rule thus: "Under constitutional provisions existing, it is assumed, in all states which guarantee to persons accused of crime the right of trial by jury, an accused person has, in every case where he has pleaded not guilty, the absolute right to have the question of guilty or not guilty submitted to the jury, no matter what the state of the evidence may be. Such is the nature of the right thus granted, that it has been frequently held that it cannot be waived by the prisoner, and that the trial of a criminal case before the court without a jury is erroneous, even where it takes place with the prisoner's consent." (Sec. 2149.)

As we have pointed out, a jury may be waived in this state in a misdemeanor case, under the express provision of the constitution, but, with this exception, we think the great weight of reason and authority supports the view that the court may not in any case upon a plea of not guilty coerce the jury by a mandatory instruction to return a verdict of guilty.

While the jury should take the law as laid down by the court and be governed by it, except in libel cases, wherein they are the judges of the law and fact (Constitution, Article III, section 10; *Paxton v. Woodward*, 31 Mont. 195, 78 Pac. 215), the person accused may not be deprived of his absolute right to have the question of his guilt or innocence not only of the particular crime charged, but of any included therein, determined by the jury without coercion by the court.

It follows that the judgment and order of the district court must be reversed and the cause remanded for a new trial.

Reversed and remanded.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

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STATE, RESPONDENT, v. KEERL, APPELLANT.

(No. 2,243.)

(Submitted January 13, 1906. Decided February 19, 1906.)

Criminal Law—Manslaughter—Once in Jeopardy—Discharge of Jury upon Disagreement—Acquittal—Constitution.

Criminal Law—Manslaughter—Trial Jury—Disagreement—Discharge—Once in Jeopardy.

1. Defendant, charged with murder, was tried three times and at the third trial found guilty of manslaughter. The jury disagreed upon the second trial and was discharged. At the third trial the plea of once in jeopardy was interposed on the ground that the jury had been discharged at the second trial without there having existed a necessity therefor. The district court overruled this defense. *Held*, that the disagreement of a jury and their consequent discharge do not operate to bring the defendant within the provision of the Constitution (Article III, Section 18) that no person shall be twice put in jeopardy for the same offense.

Same.

2. Where a person charged with crime, after a trial, is neither convicted nor acquitted, but owing to a mistrial the jury is discharged and the trial ended, he may again be put upon trial for the same offense, and the defense of once in jeopardy will not lie.

Same—District Courts—Minutes.

3. In a prosecution for murder, where the jury was discharged at the end of a mistrial, because there was "a reasonable probability

that the jury cannot agree," an entry in the minutes in those words was in accordance with the provisions of the Penal Code, section 2125, and sufficient.

ON MOTION FOR REHEARING.

Same—Acquittal—What may Constitute.

4. *Obiter*: Where the defendant in a criminal prosecution has been arraigned and the trial has been begun upon a valid indictment or information, and he is discharged by a competent court before verdict, an acquittal results, and the plea of once in jeopardy will lie. (Penal Code, section 2126.)

Same—Jeopardy.

5. In a given criminal prosecution there is only one jeopardy which continues in case of a discharge of the jury for disagreement, as also where a new trial is granted, from the beginning of the trial, after the swearing in of the first jury, until the particular same case is finally determined.

Same.

6. After a verdict on a judgment of conviction or acquittal, the defendant in a criminal case has been in jeopardy and may not be tried again for the same offense, except where a new trial has been granted or ordered.

Same—Plea of "Once in Jeopardy"—What It Includes.

7. The plea of "once in jeopardy" includes the plea of former conviction or acquittal and a judgment of conviction or acquittal.

Appeal from District Court, Cascade County; Jere B. Leslie, Judge.

JAMES S. KEERL was convicted of the crime of manslaughter. He appeals from the judgment of conviction and from an order denying him a new trial.

Mr. C. B. Nolan, and Mr. T. J. Walsh, for Appellant.

The record presents the question as to whether a discharge of the jury, under the circumstances of this case, will warrant a re-trial and that raises for consideration the question as to the circumstances and conditions under which a jury may be discharged for failure to agree, without such discharge operating as an acquittal.

When the meaning and effect of the constitutional provisions providing that no person should twice be put in jeopardy for the same offense first came before the courts of this country for consideration, it was held in quite a few instances that if a jury disagreed, the defendant was entitled to his discharge, because

to put him on trial a second time, under such circumstances, would be violative of the constitutional guaranty. Decisions to this effect were made in Pennsylvania, Virginia and the Carolinas. Later decisions in these states repudiated this rule, and they now conform, practically, to the decisions in the states generally, holding that the inability of the jury to agree, is such a necessity as warrants the discharge of the jury and permits the retrial of the defendant. (12 Cyc. 273, par. 14; 11 Am. & Eng. Ency. of Law, 1st ed., 953; 17 Am. & Eng. Ency. of Law, 2d ed., 1254, 1255.)

The rule now generally accepted is that a retrial may be had "if by any overruling necessity the jury are discharged without a verdict." (4 Am. & Eng. Ency. of Law, 1st ed., 797.) Such overruling necessity exists if the term comes to an end before the trial is finished, or if the judge or some member of the jury should die or become so seriously ill as to be unable to proceed with the cause. So, also, the defendant is held not to have been in jeopardy "if the jury is discharged after considering the cause for such a length of time as to leave no reasonable expectation that they will be able to agree upon a verdict." Necessity is the only justification for the discharge of the jury, and the authorities hold that where "there is no reasonable expectation that they will be able to agree, such a condition of affairs constitutes absolute and urgent necessity, and justifies the court in discharging the jury." (12 Cyc. 273.)

With a view to express the extremity which must be arrived at before the court will be warranted in discharging a jury, the courts have not contented themselves with saying even that a necessity must arise, but they have used qualifying terms intended to indicate that such a condition must exist as renders that course the only one practicable at all. Thus in *Ex parte Glenn*, 111 Fed. 257-261, it is said that a discharge except under an "imperious necessity" will operate as an acquittal. The same qualifying adjective to describe the character of the necessity which will warrant such action is used in the opinion in *McCorkle v. State*, 14 Ind. 39. In *State v. Allen*, 59 Kan. 758, 54

Pac. 1060, it is said that an "absolute necessity" must exist. An "overruling necessity" is the way it is expressed in *Helm v. State*, 66 Miss. 537, 6 South. 322, and in *Ex parte Maxwell*, 11 Nev. 435.

It is generally held also that to warrant a second trial of the defendant, after a discharge of the jury, the record must show the necessity for the prior discharge. (1 Bishop's Criminal Law, 873; 17 Am. & Eng. Ency. of Law, 2d ed., 1255; *People v. Cage*, 48 Cal. 326, 327, 17 Am. Rep. 436; *State v. Schuchardt*, 18 Neb. 454, 25 N. W. 722; *Upchurch v. State*, 36 Tex. Cr. Rep. 624, 38 S. W. 206, 44 L. R. A. 694-699. See, also, *Ex parte Maxwell*, 11 Nev. 428-437; *State v. Allen*, 59 Kan. 758, 54 Pac. 1060; *State v. Klauer* (Kan.), 78 Pac. 802.)

The rules laid down in the authorities to which we have adverted are not such as depend in any manner whatever upon statutory provisions. They are principles which have been worked out by the courts, as following from the constitutional right of a defendant not to be twice put in jeopardy for the same offense. In recognition of the principles so announced and the construction of the constitutional provision referred to, by the courts, statutes have been passed in many states declaratory of the law authorizing the discharge of a jury for failure to agree. With scarcely an exception they embody the idea expressed in the California statute that there is no warrant for the discharge of the jury until there is no longer any reasonable probability that the jury can agree, that all reasonable hope and expectancy of a verdict has vanished.

Section 2125, Penal Code, vests in the court a power to discharge the jury under circumstances never heretofore accorded by any statute, and when the occasion for the establishment in the English law of the principle embodied in the constitutional guaranty is taken into consideration, it will appear at once that it was intended to take away from the court the power to discharge, under the circumstances mentioned in the statute, or at least to make a discharge, under the circumstances, operate as an acquittal of the defendant.

The principle had its origin in the English law, out of the attempts of the crown to prosecute and punish for alleged offenses of a political nature. Under the English system, where the judge held by appointment from the crown, it was not at all unheard of in the days of the more or less arbitrary power in the sovereign, for judges, at a hint from the government representatives, to discharge, on some trivial pretext, a jury which the crown representatives thought would be likely to acquit that defendant, and hold him to answer before another jury which might be more tractable or obsequious; or, if the defendant happened to be a favorite of the crown, to let the jury go, in the hope that he might stand a better show of acquittal when again brought to the bar.

The defendant in this case had a clear constitutional right to have the jury who heard the evidence against him at the second trial continue in its deliberations on the same, and in the effort to arrive at a verdict thereunder, not only until there was a probability that they could not agree, or a reasonable probability that they could not agree, or even, for the matter of that, a *strong* probability that they could not agree, but until every reasonable hope or expectancy of their arriving at a verdict was gone; in short, until there was no longer any reasonable probability that they would agree.

Having then, in effect, been acquitted of the crime charged, by the discharge of the jury, the further proceedings against him were in violation of his rights under the state Constitution, and in contravention of the Fourteenth Amendment to the Constitution of the United States. (*In re Bennett*, 84 Fed. 324.)

Mr. Albert J. Galen, Attorney General, and *Mr. E. M. Hall*, Assistant Attorney General, for Respondent.

Was the appellant placed in jeopardy at the second trial? "In general, it may be said that jeopardy begins when the trial jury, upon a *sufficient indictment*, has been impaneled and sworn to try the case. The indictment not being sufficient, jeopardy did not begin with the impaneling of the jury." (*State v.*

Smith, 88 Iowa, 178, 55 N. W. 200.) "The law is well settled that when an indictment is in form so defective that the defendant, if found guilty, will be entitled to have any judgment rendered against him reversed for error, he is not in jeopardy." (*State v. Meekins*, 41 La. Ann. 543, 6 South. 823. Also see *Pritchett v. State*, 2 Sneed (Tenn.), 290, 62 Am. Dec. 468; *Western v. State*, 63 Ala. 156.) For what constitutes jeopardy, see 17 Am. & Eng. Ency. of Law, 2d ed., 584; also Pen. Code, sec. 1945.

No question is raised as to the length of time the jury had been deliberating. It is impliedly admitted that such time had expired "as the court may deem proper" before discharging the jury. The time the jury has already been deliberating upon the case must be considered by the judge in satisfying himself that the jury cannot agree, and that the time the jury has been out without agreeing is the controlling fact to be considered in determining when to discharge the jury. When the jury has been out forty or fifty hours without agreeing, very slight evidence, in addition to this fact, will justify the court in discharging the jury. A statement from the jury at the end of such a period to the effect that they were unable to agree would certainly be sufficient to justify their discharge; in fact, a mere statement at the end of forty hours that they had not agreed ought to be sufficient. It would be a proper exercise of the discretion lodged in the court. (*Logan v. United States*, 144 U. S. 297, 12 Sup. Ct. 617, 36 L. Ed. 429; *Dryer v. Illinois*, 187 U. S. 85, 86, 23 Sup. Ct. 28, 47 L. Ed. 79; *People v. Green*, 13 Wend. (N. Y.) 56.) How long had the jury in this case been deliberating? The burden is upon appellant to show that the record of the discharge of the jury sustains the defense of former jeopardy and acquittal. "The defendant holding the affirmative of the issue, the burden of maintaining the defense of former acquittal is upon him." (9 Ency. of Pl. & Pr. 637; Spelling on New Trial and Appeal, sec. 738.) The fact that the record shows that the jury were out at least forty hours and then returned into court and satisfied the court that they could not

agree is sufficient to justify the court in discharging them. (*Logan v. United States*, 144 U. S. 297, 12 Sup. Ct. 617, 36 L. Ed. 429; *State v. Nelson*, 26 Ind. 366.)

The fact that the jury *were discharged* after coming into court and making their report shows that the court *was satisfied* that the jury could not agree.

But the appellant insists that the court in stating the reasons for making the discharge should have said: "It satisfactorily appearing to the court that there is *no reasonable probability* of the jury agreeing," instead of following the language of the statute and saying, "It satisfactorily appearing to the court that there is a *reasonable probability* that the jury *cannot* agree."

A "reasonable probability" as the term is used in section 2125, Penal Code, means such a probability as would exclude any reasonable possibility of the jury agreeing. The word "reasonable" is the controlling word. A "probability," or "a mere probability" that they cannot agree would not be sufficient. The probability that they cannot agree, in order to be sufficient to justify their discharge, must be a *reasonable one*. To be a reasonable one, it must be based upon all the facts and circumstances before the court and be sufficient to satisfy the court that the jury should be discharged. When the court makes an order that there is a "*reasonable probability*" that the jury cannot agree, we must presume that all the necessary facts have been shown to satisfy the court.

We submit that when the court makes a finding that it satisfactorily appears to the court that there is a "*reasonable probability* that the jury cannot agree," and thereupon discharges the jury, such discharge will not sustain a plea of former jeopardy.

MR. JUSTICE MILBURN delivered the opinion of the court.

This case is on appeal from a judgment of conviction of man-

slaughter. The defendant was tried three times. The first trial resulted in conviction of murder in the second degree. The judgment was reversed on appeal (*State v. Keerl*, 29 Mont. 508, 101 Am. St. Rep. 579, 75 Pac. 362). Upon the second trial the jury disagreed and was discharged. The third trial resulted in the conviction for manslaughter and the judgment from which the appeal was taken.

The alleged crime was committed in Lewis and Clark county. The third trial was had, by change of place of trial, before the district court of the eighth judicial district. Before entering upon the third trial the information was amended in the particulars suggested in the opinion of this court after the first trial. The second trial was upon information without amendment.

The brief of appellant sets out six specifications of error, only one of which was argued orally, the rest being submitted merely upon the briefs. After considering all, we find that the one argued orally is the only one worthy of consideration and it is the one which will be noticed herein. The specification which we must consider is: "The court erred in not sustaining the second plea of appellant, that he was once in jeopardy and acquitted through the improper discharge of the jury upon the second trial."

Upon the second trial of the defendant the jury, after deliberating upon their verdict for about twenty-four hours, returned into court and having been inquired of by the judge, was discharged and the following minute entry was made by the court: "In this cause the jury returned this day into open court, the defendant being present in person and by counsel; whereupon it satisfactorily appearing to the court that there is a reasonable probability that the jury cannot agree, court ordered the jury discharged from further consideration of this cause."

The plea relied upon on the beginning of the third trial is as specified above, the formal plea in writing containing the fol-

lowing language, speaking of the second trial: "The said jury retired to deliberate and having on the fourteenth day of July, 1904, after the expiration of about twenty-four hours after their retirement to deliberate upon their verdict returned into court, they were questioned by the court as to whether they had agreed and having reported to the court as the fact was, that they had not agreed, the said jury were by the said court on the said fourteenth day of July, 1904, without the consent of the defendant and without having arrived at or returned any verdict, discharged, without there existing any necessity for the discharge of the said jury and without there being or existing no reasonable probability that the said jury could or would agree upon a verdict. * * * The said court directed the clerk thereof to enter of record that the court found that there was a reasonable probability that the said jury would not agree and that they were for that reason discharged."

Article V of the Amendments to the Constitution of the United State provides: " * * * Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. * * * "

Section 18 of Article III of the Constitution of the state of Montana provides: " * * * Nor shall any person be twice put in jeopardy for the same offense."

Our Constitution includes all in the Federal Constitution on the subject, and more, and is not in any wise in contravention thereof. This question has been argued since American courts have been established under our Constitution, and has been considered from every possible standpoint, and the opinions are not consistent or reconcilable. Many of the courts have held that after the jury is sworn in a criminal case, the defendant is in jeopardy, and that, except in a case of necessity arising from some act almost amounting to an "act of God," the jury may not be discharged without such discharge amounting to an acquittal. Other courts have held that the discharge lies in the discretion of the court for reasons sufficiently appearing to it. Others have held that in capital cases the dis-

charge of the jury, for reasons of accident or otherwise, will not amount to an acquittal. We think that all of these holdings are inconsistent with the idea that the defendant is in such jeopardy as the Constitutions, federal and state, refer to, as soon as the jury is sworn, because if the defendant is in such jeopardy as soon as the jury is sworn, then the death of a juror, or a disagreement of the jury, could not alter the fact. What has happened has happened and cannot be changed without a miracle.

Our legislature in the enactment of the Penal Code has, with abundance of caution, undertaken to pass upon this matter in at least four sections. Section 2124 provides: "If, after the retirement of the jury, one of them be taken so sick as to prevent the continuance of his duty, or any other accident or cause occur to prevent their being kept for deliberation, the jury may be discharged."

Section 2125 reads: "Except as provided in the last section, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict, and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless at the expiration of such time as the court may deem proper, it satisfactorily appears that there is reasonable probability that the jury cannot agree."

Section 2126 provides: "In all cases where a jury is discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged during the progress of the trial, or after the cause is submitted to them, the cause may be again tried."

Section 2103 reads as follows: "When the defendant has been convicted or acquitted upon an indictment or information for an offense, consisting of different degrees, the conviction or acquittal is a bar to another indictment or information for the offense charged in the former, or for any lower degree of that offense, or for an offense necessarily included therein."

The legislative construction of what the Constitution means in regard to twice being put in jeopardy is apparent from a read-

ing of section 1356 of the Penal Code, to-wit: "No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and *convicted or acquitted*." This implies a verdict, and is consistent with the views of the supreme court of the United States as it announced them in *United States v. Perez*, 9 Wheat. 579, 6 L. Ed. 165, respecting a prisoner who was tried for a capital offense, the jury being discharged without agreeing upon a verdict and without the consent of the defendant: "The prisoner has not been convicted or acquitted, and may again be put upon his defense."

We think that the legislature meant by this latter section that a person may not be subjected to a second prosecution if once there has been rendered against him a verdict of conviction or a verdict of acquittal has been returned in his favor. We do not believe that it meant to say that "in case a verdict of conviction or a verdict of acquittal has been rendered, *or* if the jury has been discharged without rendering any verdict, the defendant in a criminal case shall not be prosecuted again for the same public offense." We do not believe that the legislature meant that the discharge of the jury amounted to an acquittal.

The authorities supporting the view that a disagreement of the jury, coupled with a failure to find a verdict, does not operate to bring the defendant within the provision of the Constitution as to former jeopardy, which view we believe to be also that of the legislature, and which we think to be in accord with our Constitution and that of the United States, are numerous, a few of which we cite: 3 Current Law, p. 984; *United States v. Perez*, *supra*; Wharton's Criminal Practice and Procedure, 8th ed., sec. 490; *Moseley v. State*, 33 Tex. 671; *State v. Walker*, 26 Ind. 346; *Commonwealth v. Purchase* (Mass.), 2 Pick. 521, 13 Am. Dec. 452; 17 Am. & Eng. Ency. of Law, 585, citations, note 1. One most fully expressing our ideas in clear language is that of *United States v. Perez*, *supra*. The case is so similar to the one under consideration that we quote the opinion in full: "The prisoner, Josef Perez, was put upon trial for a capital offense, and the jury, being unable to agree, were discharged by the court

from giving any verdict upon the indictment, without the consent of the prisoner, or of the attorney for the United States. The prisoner's counsel thereupon claimed his discharge as of right, under these circumstances; and this forms the point upon which the judges were divided. The question, therefore, arises, whether the discharge of the jury by the court from giving any verdict upon the indictment, with which they were charged, without the consent of the prisoner, is a bar to any future trial for the same offense. If it be, then he is entitled to be discharged from custody; if not, then he ought to be held in imprisonment until such trial can be had. We are of opinion that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defense. We think that in all cases of this nature the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, *after all*, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject, in the American courts; but, after weighing the question with due deliberation, we are of opinion that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial."

So far as the reasoning is concerned, it does not make any difference, under the broad provision of our Constitution, as to any charge, so it is the same offense, whether the defendant is put upon trial for a capital offense or for murder in the second degree, which is not a capital offense under our law.

In conclusion, we repeat the language of the federal court in *United States v. Perez, supra*: "We are aware that there is some diversity of opinion and practice on this subject, in the American courts; but, after weighing the question with due deliberation, we are of the opinion that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial."

The entry made by the court in its minutes as to its action in discharging the jury, and the reason therefor, complies with the statute and is sufficient.

The judgment is affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY concurs.

MR. CHIEF JUSTICE BRANTLY: I concur in the conclusion reached in the majority opinion, but do not wish to be understood as giving assent to the proposition that in order for a defendant to sustain his plea of former jeopardy, he must always show a former conviction or acquittal of the same charge by a verdict of a jury. I think it possible that the trial court might so far abuse its discretion in discharging a jury on the ground that it has failed to agree, that the prisoner should be held to be acquitted.

ON MOTION FOR REHEARING.

MR. JUSTICE MILBURN delivered the opinion of the court.

Counsel invites the attention of the court to certain sections of the Penal Code which were not cited by the court in the former opinion, desiring to convince us that the word "jeopardy," as used in the legislative Acts of the state, should be understood as meaning more than former acquittal or former conviction, and saying that we have inadvertently overlooked the distinc-

tion between real and apparent jeopardy. After further consideration of this difficult matter, upon which the court and text-writers of the country are so hopelessly divided, we are of the opinion that what we said in the former opinion should be amplified, but not that our conclusion should be changed.

Section 1940 of the Penal Code is as follows: "There are four kinds of pleas to an indictment or information: A plea of—1. Guilty. 2. Not guilty. 3. A former *judgment* of conviction or acquittal of the offense charged, which may be pleaded either with or without the plea of not guilty. 4. Once in jeopardy."

Section 1941 of the same Code provides: "Every plea must be oral, and entered upon the minutes of the court in substantially the following form: * * * 3. If he plead a former conviction or acquittal: 'The defendant pleads that he has already been convicted (or acquitted) of the offense charged by the *judgment* of the court of — (naming it), rendered at — (naming the place) on the — day of —.' 4. If he plead once in jeopardy: 'The defendant pleads that he has been once in jeopardy for the offense charged' (specifying the time, place and court)."

Section 1947 reads: "When the defendant is *convicted* or *acquitted*, or *has been once placed in jeopardy* upon an indictment or information, the conviction, acquittal or jeopardy is a bar to another indictment or information for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been *convicted* under the indictment or information."

Section 1990 is as follows: "An issue of fact arises: 1. Upon a plea of not guilty. 2. Upon a plea of *a former conviction or acquittal* of the same offense. 3. Upon a plea of *once in jeopardy*."

Section 1356 provides: "No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted."

Section 2126 reads as follows: "*In all cases* where a jury is discharged or prevented from giving a verdict by reason of an

accident or other cause, except where the defendant is discharged during the progress of the trial, or after the cause is submitted to them, the cause may be again tried." This last section, which was not called to our attention by counsel, supports the position taken in the former opinion.

The language of the statute in these several sections is not clear, and the sections are apparently somewhat conflicting, but, when read together, are not impossible to understand. Section 1940, in the third subdivision cited, provides that "a former *judgment* of conviction or acquittal of the offense charged" may be pleaded, but, as we see, other sections speak of *conviction* or *acquittal* merely. The special plea of former *judgment of conviction or acquittal*, or of former *conviction or acquittal*, seems to be superfluous, for the reason that the plea of "once in jeopardy" can be made. The latter includes the plea of former conviction or acquittal and a judgment of conviction or acquittal. Certainly, if a man has been convicted and a judgment of conviction has been entered for a felony, he has been "once in jeopardy." We think that the plea of "once in jeopardy" was added to include other cases of jeopardy than those of judgment of conviction or acquittal. In section 2126 it appears conclusively that the defendant may not be tried again if he has been discharged during the progress of the trial or after the case has been submitted to the jury, although the jury may have been discharged or prevented from giving a verdict by reason of an accident or other cause. Such a discharge of the prisoner amounts to an acquittal and brings him within the provision of section 1356, although there has not been any judgment of acquittal as mentioned in section 1940. Section 2126 seems to expressly provide for the case now under consideration, for it says that in *all* cases of a disagreement of a jury, the prisoner may be tried again, unless he has been discharged as aforesaid. In case of the discharge of the jury for disagreement, as in the case of granting a new trial, the jeopardy is the same continuing jeopardy from the beginning of the trial after the swearing in of the first jury, until the particular same case is

determined. There is only one jeopardy; a second jeopardy can only be pleaded in another case. A new trial is the re-examination of the facts under the same plea of not guilty, on the same information or indictment.

Certainly, there has not been any judgment of conviction or acquittal in the case before us. There has not been any conviction without a judgment. Has there been an acquittal without a judgment? What is an acquittal? The appellant certainly has not been adjudged to be acquitted. This question is not the simple one that it appears to be. The word "acquittal" is said to be "*verbum equivocum*." For some of the equivocations, see Words and Phrases, volume 1, page 114. The definition expressed or implied in our former opinion in this case is too narrow, although supported by authority. We consider that one is acquitted if, after he has been arraigned and the trial has been begun upon a valid indictment or information, he is discharged by a competent court before verdict. (Penal Code, sec. 2126.) He has been in jeopardy. Such is not the situation in the case before us.

We are also of the opinion that after a verdict or a judgment of conviction or acquittal, the defendant in a criminal case has been in jeopardy and may not be tried again for the same offense, except in a case of a new trial which has been granted or ordered. The jeopardy which is forbidden is a new jeopardy. In the case before us the defendant, when he went to trial the third time, was in the same jeopardy that he was in when the first trial was had. The continuance of the jeopardy is not a new jeopardy. A mistrial or a new trial secured by plaintiff or defendant continues the jeopardy and does not renew it. If this court was correct in the two cases in which new trials were ordered in criminal cases on appeal by the prosecution (*State v. Herron*, 12 Mont. 230, 300, 30 Pac. 140; *State v. Mjelde*, 29 Mont. 490, 75 Pac. 87), then, on a new trial, the jeopardy would not be a new one but a continuation of the old danger. (This remark is made by the writer of this opinion on his sole responsibility, and not with the concurrence of the other

members of the court. He has now a doubt as to the logic and correctness of those two opinions, in the latter of which he concurred.)

In the *Perez Case* cited, the federal supreme court decided that when a court discharged a disagreeing jury in a capital case, the defendant was not put again into jeopardy on a new trial. It made no exception in a supposed case of abuse of discretion. This decision of the highest court of the country is strongly persuasive. Section 2126 settles it.

The defendant here was not acquitted. He was not twice put in jeopardy. There was not a new jeopardy. The record of the court as to the discharge of the jury was statutory and sufficient as to the reason why the jury was discharged and as to the necessity for discharging them.

Mr. Justice Holmes in his dissenting opinion in *Kepner v. United States*, 195 U. S., at page 134, 24 Sup. Ct. 797, 49 L. Ed. 126, while being of the opinion that the defendant should have stood convicted on the trial by the Philippine appellate court, lays down certain general principles applicable to all cases. He says: "It seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case. It has been decided by this court that he may be tried a second time, even for his life, if the jury disagree. (*United States v. Perez*, 9 Wheat. 579. See *Simmons v. United States*, 142 U. S. 148; *Logan v. United States*, 144 U. S. 263; *Thompson v. United States*, 155 U. S. 271.)"

The former opinion herein is modified to conform to the views herein expressed, and the motion for rehearing is denied.

Rehearing denied.

MR. JUSTICE HOLLOWAY concurs.

MR. CHIEF JUSTICE BRANTLY: I concur in the result.

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35 338

KIRBY, RESPONDENT, v. HIGGINS ET AL., APPELLANTS.

(No. 2,224.)

(Submitted January 11, 1906. Decided February 19, 1906.)

*Mining Claims—Action to Determine Adverse Claims—Equity—
Evidence—Exhibits—Record.**Mines—Adverse Claims—Equity.*

1. A suit to determine an adverse claim to mining property is one of equitable cognizance.

Same—Evidence—Sufficiency—Review.

2. Evidence reviewed in an action to determine an adverse claim to mining property, and held insufficient to support a verdict in favor of plaintiff, in that it wholly failed to identify the ground claimed.

Same—Review—Exhibits—Maps—Record.

3. Where, in a suit to determine an adverse claim to mining property, maps are used in connection with the oral testimony of witnesses, identifying marks should be placed upon the maps, with proper references to such marks in the record, so as to make any allusion to them by the witnesses intelligible to the appellate tribunal in reviewing the evidence.

Appeal from District Court, Powell County; Welling Napton, Judge.

ACTION by George J. Kirby against W. I. Higgins and Joseph Robinson. Plaintiff had judgment, and from an order denying them a new trial the defendants appeal. Reversed.

Mr. J. B. Clayberg, and Mr. Edward Scharnikow, for Appellants.

Mr. E. B. Howell, and Mr. H. P. Napton, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1902 the owners of the Dewey quartz lode mining claim made application for patent. The owner of the Nugget placer, a conflicting claim, filed his protest and adverse claim, which adverse was allowed, and within the time limited by law this action was commenced in the district court of Powell county

to have determined which, if either, of the parties to the action is entitled to the ground in conflict.

To the complaint is attached a plat showing the location of each of the conflicting claims and the ground in controversy. The answer raises issues as to all material allegations of the complaint. The cause was tried as an action at law to the court sitting with a jury. The jury returned a verdict "in favor of the plaintiff and against the defendant for the ground in controversy," and upon this verdict a judgment was entered in favor of the plaintiff adjudging him to be entitled to the ground in controversy as described in the complaint. From an order denying them a new trial the defendants appealed. The errors assigned are insufficiency of the evidence to support the verdict, and errors of law in the giving of certain instructions.

In his behalf the plaintiff introduced the witness Hobart, a surveyor and mining engineer who had surveyed the Nugget placer and had made a map of it. Much of the testimony was given with reference to this map, and is quite unintelligible to this court, for the reason that when a witness was asked to designate a particular point on the map and did so, instead of having some identifying mark placed on the map, the record merely says, "witness indicates," or uses some other equally indefinite expression. One instance will suffice to illustrate this: "Q. Will you please to point out on the map where the line 600 feet southwesterly from the discovery would be? (Witness indicates.) Q. Will you please mark on the map the end lines across with a pencil at that point? (Witness marks same.) Q. Now, how far is the end line, as you have it marked on the plat, to the northeasterly line—for (from) the discovery in a northeasterly direction? The Witness: About 235 feet. Q. Will you mark on the map the point where 200 feet would be from the discovery in a northeasterly direction? (Witness marks.) Q. Will you draw a line at that point, with a pencil? (Witness draws line.)" All of this might have been understood by the court and jury, but is wholly unintelligible to this court.

However, the courses and distances given by the witness Hobart would seem to indicate that the ground surveyed by him as the Nugget placer is the same ground as that described in the complaint as the claim by that name, which is a quadrangle, one end being $321 \frac{5}{10}$ feet long, the other $264 \frac{5}{10}$ feet; one side being 1197 feet long and the other $1150 \frac{5}{10}$ feet. This witness, however, could positively identify but two corner posts, one marked "Nugget Placer" and the other "Southwest Corner, No. 3, Nugget Placer." He found two other posts which were pointed out to him as corner posts of the Nugget placer, but upon which he was unable to detect any markings whatever.

The plaintiff then offered in evidence the declaratory statement of the Nugget placer, which describes a piece of ground 800 feet long, 200 feet wide at one end and 70 feet wide at the other, and describes the corners as follows: "Beginning at corner No. 1, a post 4 inches square by $4\frac{1}{2}$ feet long set one foot deep with a mound of stone 4 feet in diameter by 2 feet in height around the same marked 'E' Cor. Nugget Placer, and running thence Northwesterly about 200 feet to corner No. 2, a tree blazed on four sides and marked N. W. Cor. Nugget Placer, and running thence Southwesterly about 800 feet to corner No. 3, a tree blazed on four sides and marked S. W. Cor. 'Nugget Placer,' and running thence easterly about 70 feet to corner No. 4, a tree blazed on four sides and marked S. E. Cor. 'Nugget Placer,' and running thence Northeasterly about 800 feet to the place of beginning."

Thereupon counsel for plaintiff said: "Mr. Howell: If the court please, we desire at this time to show that the plaintiff complains only of the amount of ground included within the location notice and relinquishes any excess." As the notice of location was not before the court or jury, so far as this record shows, it is somewhat difficult to understand what counsel meant; however, again he says: "It is a question whether the posts would not cover all, but all we want is the ground included in the discovery statement, and the same way with the lode claim, and, at the proper time, we will relinquish as to the

lode claim." We assume that when counsel referred to "location notice" in the one instance, and "discovery statement" in the other, he meant "declaratory statement," and intended to relinquish all claim to the ground in controversy except that shown to be in conflict by the declaratory statement of the Nugget placer and the description of the Dewey lode as given in the answer.

Plaintiff also called G. H. Schultz, the locator of the Nugget placer, who testified that he made the location in 1900; that he dug a sufficient discovery cut, found some placer gold, posted a notice of location and recorded the declaratory statement. He was then asked to point out the location of the corners, on the map before the court, and describe the markings, which he did. One corner was marked "Southeast Corner No. 1," with the name of the claim, and with respect to each of the other corners he says: "I marked it the same as the others," but does not give any courses or distances. Again he says, with respect to the Nugget placer claim: "I think I took out 800 feet in length and 300 feet in width on that placer claim." He testified that he is a citizen of the United States, qualified to make the location.

Peter Commeau testified on behalf of the plaintiff that he did the necessary representation work for the year 1901. Plaintiff then showed the transfer of this claim to him and rested his case.

The defendants then introduced their evidence with respect to the Dewey lode claim and rested, and the plaintiff offered evidence in rebuttal; but neither the evidence offered by defendants nor by plaintiff in rebuttal aided in any respect the proof offered by the plaintiff in his case in chief.

We are now asked to say whether there is evidence sufficient to sustain the verdict returned. The verdict does not attempt to describe the ground awarded to plaintiff. The Nugget placer claim as described in the complaint and by the witness Hobart is practically three times as large as the same claim described in the declaratory statement. The evident purpose of

the plaintiff was to claim only the ground in controversy as shown by the conflict between the Dewey lode claim and the Nugget placer as described in the declaratory statement; and while the map attached to plaintiff's complaint shows the conflict between the Dewey lode and the Nugget placer as described in the complaint, it does not show the conflict between the Dewey lode and the Nugget placer as described in the declaratory statement, and the plaintiff wholly failed to identify the Nugget placer as described in the declaratory statement with the same claim as described in the complaint and by the witness Hobart. From anything that appears in this record, it would have been equally as plain to the jury for the plaintiff to have said: "I have described fifteen acres of ground in my complaint, but I now relinquish two-thirds of that and only ask to be awarded one-third of it," without informing the jury which particular one-third was desired. The record recites that it contains "all the evidence given in said cause," and this is not questioned.

In the absence of any attempted identification of the particular ground claimed, it was simply impossible for the jury to make any finding in plaintiff's favor at all. Singularly enough, although counsel for plaintiff relinquished all claim to the ground in controversy, except such as might be shown to be in conflict between the Dewey lode claim and the Nugget placer as described in the declaratory statement, the court entered judgment for plaintiff awarding him all the ground in controversy, as described in the complaint.

Some of the instructions given are conflicting, but, doubtless, upon another trial, the action will be tried as a suit in equity, which it is. (*Mares v. Dillon*, 30 Mont. 117, 75 Pac. 963.)

The evidence is wholly insufficient to support the verdict. The order denying defendants a new trial is reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

BROWN ET AL., APPELLANTS, v. DALY, EXECUTRIX, RESPONDENT.

(No. 2,208.)

(Submitted January 1, 1906. Decided February 26, 1906.)

Executors and Administrators—Claims Against Estate—Presentation—Appeal—Pleadings—Parties—Actions—Appeal.

Appeal—Complaint—Insufficiency—Amendments—Reversal.

1. Where a complaint fails to state a cause of action, and it is apparent that it cannot be amended to do so, the judgment of the trial court in favor of defendant, alleged to be erroneous for other reasons, will not be reversed.

Contracts—Actions—Joint Parties.

2. In an action brought by B. and wife for breach of an agreement to pay to them jointly a certain sum of money, the promisees are necessary parties plaintiff and their action can be joint only.

Executors and Administrators—Clause Against Estate—Presentation—Actions.

3. Under Code of Civil Procedure, sections 2606, 2606 and 2610, a claim against an estate must first be presented to the executor or administrator for allowance or rejection before action can be brought to enforce such claim. B. and wife, in an action against the executrix of an estate for the breach of an agreement, entered into with them by decedent, to pay to them jointly a certain sum of money, alleged that each had presented to the executrix a separate claim for half the amount sued for and that the claims had been rejected: *Held*, that plaintiffs, never having presented a joint claim against the estate, could not maintain a joint action based upon the presentation and rejection of their separate claims.

District Courts—Trial—Exclusion of Evidence.

4. If the trial court's ruling upon the exclusion of evidence is correct, the reason upon which it is founded is immaterial.

Appeal from District Court, Deer Lodge County; Geo. B. Winston, Judge.

ACTION by Frank G. and Sadie J. Brown against Margaret Daly, executrix of the estate of Marcus Daly, deceased. Judgment for defendant. Plaintiffs appeal. Affirmed.

Messrs. Kirk & Clinton, and Mr. C. M. Sawyer, for Appellants.

Any objections that might have been urged by defendant because of the introduction of a new cause of action in the amended

complaint were waived. (1 Ency. of Pl. & Pr., p. 571; *Wheeler v. West*, 78 Cal. 95, 20 Pac. 45; *King v. Rea*, 13 Colo. 69, 21 Pac. 1084; *Wade v. Clark*, 52 Iowa, 158, 35 Am. Rep. 262, 2 N. W. 1039; *Hancock v. Johnson*, 1 Met. (Ky.) 242; *Wilson v. Jamieson*, 7 Pa. St. 126; *Busch v. Hagenrick*, 10 Neb. 415, 6 N. W. 474; *Turner v. Roundtree*, 30 Ala. 706.)

The objection must be specific; if it is based upon other grounds, the allowance of the amendment cannot be assigned as error on the ground that it sets up a new cause of action. (*Parsons Water Co. v. Hill*, 46 Kan. 145; 26 Pac. 412.) By waiving the objection that the amended complaint stated a new cause of action, defendant voluntarily permitted the amended complaint, in so far as the time of filing is concerned, to relate back to the time of the filing of the original complaint. And inasmuch as the defendant, by her own acts, has permitted the time of filing of the amended complaint to relate back to the time of filing of the original complaint, against which section 2608 had not run, she has thereby waived any objection which might have been urged under section 2608 of the Code of Civil Procedure to the cause of action contained in the amended complaint. (*Mullen v. McKim*, 22 Colo. 468, 45 Pac. 416.)

By pleading generally to the whole cause of action, the specific objection that possibly might be urged against the claim of Sadie J. Brown was waived, and cannot now be considered.

In this connection, we also contend that the original action having been instituted in time, the omission of all necessary or proper parties would not affect it in its entirety. The requirement of the statute that the action should be commenced and prosecuted within three months after rejection of the claims by the executrix was fully met. The amendment making plaintiff, Sadie J. Brown, a party was not a new cause of action, but only a fuller statement of the original. (*East Line etc. R. R. Co. v. Culbertson*, 72 Tex. 375, 13 Am. St. Rep. 805, 10 S. W. 706, 3 L. R. A. 570; *Martin v. Ihmsen*, 21 How. (U. S.) 394, 16 L. Ed. 134; *Bradford v. Andrews*, 20 Ohio St. 208, 5 Am. Rep.

645; *Agee v. Williams*, 30 Ala. 636; *Martin v. Young*, 85 N. C. 156.)

Mr. C. F. Kelley, and *Mr. A. J. Campbell*, for Respondent.

"The law will not tolerate the division of a joint right of action into several actions; the whole cause of action must be determined in one, and thus avoid a multiplicity of suits." (*Nightingale v. Scannell*, 6 Cal. 507, 65 Am. Dec. 525.)

A breach of an entire contract will entitle only one action or it will be considered that thereby the contract is entirely destroyed. (*Atwood v. Norton*, 27 Barb. 647; 15 Am. & Eng. Ency. of Pl. & Pr. 528; *McGilvary v. Moorehead*, 3 Cal. 267.)

The executrix had no right to waive the benefits of the statute of limitations which might be urged against a claim presented to the executor, administrator or judge for allowance. (Code Civ. Proc., sec. 2608; *In re Mouillerat's Estate*, 14 Mont. 245, 36 Pac. 185.) And if she could not have waived them herself by any direct act, by no possible argument can it be contended that her attorneys could waive for her a right which she herself could not have waived. (See, also, *Miner v. Aylesworth*, 18 Fed. 199; *Nagle v. Ball*, 71 Miss. 333, 13 South. 929; *O'Keefe v. Foster*, 5 Wyo. 343, 40 Pac. 525.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On October 5, 1901, Frank G. Brown and Sadie J. Brown each presented to the executrix of the estate of Marcus Daly, deceased, a claim, duly verified, for the sum of \$5,775.00. Each of the claims was in substantially the same form, that of Frank G. Brown being as follows:

"Estate of Marcus Daly, Deceased, to Frank G. Brown, Dr.

"To (1½) one-half interest of balance due for certain real estate and water rights sold to Marcus Daly, deceased, as per agreement made and entered into on the 1st day of November, 1897, and that thereafter deed was duly made and executed by

Frank G. Brown and Sadie J. Brown and delivered to Marcus Daly, deceased, for a consideration of Twenty-five thousand (\$25,000.00) Dollars, conveying all the property mentioned in the said contract, and interest on the balance due at 10 per cent per annum from the 7th day of December, 1898, to and including the 16th day of October, 1901.

“Balance due on original contract.....\$4,500.00

Interest on same at 10%..... 1,275.00

\$5,775.00.”

Each of these claims was disallowed by the executrix. On November 16, 1901, Frank G. Brown commenced an action in the district court of Deer Lodge county against Margaret Daly, as executrix of the last will and testament of Marcus Daly, deceased, to recover the amount of his individual claim, \$5,775.00.

To the complaint filed the defendant interposed a general demurrer, and a special demurrer on the ground of a defect of parties plaintiff. This demurrer was confessed, and thereafter, on April 17, 1903, by leave of court and without objection from defendant, the plaintiff filed an amended complaint, joining Sadie J. Brown as party plaintiff, incorporating into the cause of action the claim of Sadie J. Brown, and demanding judgment for \$11,550.00 and certain interest. This amended complaint alleged that in November, 1897, Frank G. Brown and Sadie J. Brown entered into an oral agreement with Marcus Daly, by the terms of which the plaintiffs were to convey to Mr. Daly certain property situated in Deer Lodge county, for which Mr. Daly agreed to pay them \$25,000 upon the execution and delivery of a deed; that in December, 1898, the deed was duly executed and delivered, and \$16,000, and no more, was paid to them on the purchase price. It is then alleged that there is a balance of \$9,000 with interest from December 7, 1898, due to the plaintiffs, no part of which has ever been paid, and that of such balance Frank G. Brown owns an undivided one-half interest, and Sadie J. Brown the remainder. It is then

alleged that Marcus Daly died in November, 1900, and that Margaret Daly was named and appointed the sole executrix of his last will and testament and qualified as such; that she gave notice to creditors as required by law, and that each of these plaintiffs duly presented his claim as set forth above.

To this amended complaint a general demurrer was interposed, and overruled. Thereafter defendant filed an answer denying the material allegations of the complaint, and, as a separate defense, pleaded the bar of the statute of limitations. A reply was filed and the cause brought on for trial; whereupon the defendant objected to the introduction of any evidence on behalf of plaintiffs "upon the ground that it affirmatively appears from the pleadings in the cause that said cause is barred by the provisions of section 2608 of the Code of Civil Procedure of the state of Montana," which objection was sustained, and on motion of the defendant a judgment was rendered and entered in her behalf for costs, from which judgment this appeal is prosecuted.

The argument of appellants is directed entirely to the order of the district court in refusing to permit them to introduce any evidence, and it is contended that this action of the court was erroneous. Respondent contends that the action of the court in this regard was not erroneous; but whether it was or not is immaterial, for the complaint does not state a cause of action, and, therefore, the judgment will not be reversed. We are not so much concerned with the reason advanced by the trial court for its ruling, as we are with the ultimate question: Was the ruling correct?

It will not be necessary for this court to go as far as counsel in stating the rule, but it is sufficient for this case to say that where the complaint does not state a cause of action, and it is apparent that it cannot be amended to do so, the judgment of the trial court will not be reversed, for to do so would be idle. The same result must inevitably be reached. (3 Cyc. 420, and cases cited.)

The amended complaint only assumes to state a single cause of action, which is to recover \$11,550, one-half of which is alleged to belong to Frank G. Brown and one-half to Sadie J. Brown. The cause of action arises out of the alleged breach, by Marcus Daly, of a contract entered into by him with Frank G. Brown and Sadie J. Brown, as set forth above. It is a general rule of law that "where a promise is made to two or more persons jointly, all the obligees must unite as plaintiffs in an action for a breach thereof, as the cause of action in such cases is joint only" (15 Ency. of Pl. & Pr. 528, and cases cited), except as otherwise provided in section 584 of the Code of Civil Procedure, which exception has no application in this case.

It appears that the promise of Mr. Daly, if made, was to pay to Frank G. Brown and Sadie J. Brown \$25,000, and was not to pay any particular portion thereof to each of them, and it is therefore immaterial what interest each has in the claim. The promise was to them jointly, and in any action brought on account of a breach of such agreement, both Frank G. Brown and Sadie J. Brown were necessary parties and the action their joint action, which neither could maintain without joining the other. (9 Cyc. 703.)

It is also a rule of law that "no holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, * * * " (Code of Civil Proc., sec. 2610), and rejected directly or by refusing or neglecting to indorse its disallowance or rejection for ten days after its presentation. (Code of Civil Proc., sec. 2606.) Within three months after such rejection an action may be commenced to enforce such claim. (Code of Civil Proc., sec. 2608.) What claim? It goes without saying that it is the identical claim which was presented; otherwise the law would be a dead letter. If a party may present to the executor of an estate a claim founded upon the breach of a several contract, and upon its disallowance maintain an action against the estate for a breach of a joint contract, without presenting any claim founded

upon such breach, the statute would become at once of no efficacy whatever and its purpose would be circumvented.

The contract of Frank G. Brown and Sadie J. Brown with Marcus Daly was a joint contract. Their action for a breach of that contract must be a joint action. They never presented a joint claim against the estate, and therefore they cannot maintain this action, which is a joint action. As they cannot maintain several actions, because the contract sued upon was a joint contract, it does not appear that the complaint can possibly be amended to state a cause of action.

It is not necessary to consider whether the district court erred in excluding evidence upon the particular ground urged in the objection. If the court's ruling was correct, it is immaterial that it was founded upon an erroneous reason. Upon the ground that the complaint does not state a cause of action, the trial court's ruling was correct.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

STATE EX REL. RIDDELL, RELATOR, v. DISTRICT COURT
OF THE SECOND JUDICIAL DISTRICT ET AL.,
RESPONDENTS.

(No. 2,264.)

(Submitted January 3, 1906. Decided February 26, 1906.)

*Costs on Appeal—Notice—Due Process of Law—Statutes—
District Courts—Jurisdiction.*

Taxation of Costs—Notice—Constitution—Due Process of Law.

1. *Semble*: A statute which authorizes the taxation of costs upon the filing of a memorandum, without notice to the person liable therefor, would seem to be obnoxious to the constitutional guaranty that no person shall be deprived of life, liberty or property without due process of law (Constitution, Article III, section 27), the phrase "due process of law" including notice and a hearing before judgment.

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Costs—Service of Memorandum—Statutes.

2. *Held*, that the provisions of section 1867 of the Code of Civil Procedure with reference to service upon the adverse party of memorandum of the items of costs and disbursements claimed by the party in whose favor judgment is rendered are applicable to proceedings under section 1869 of the same Code, relative to costs awarded by an appellate court.

Costs—Collection—Mode to be Pursued.

3. The recovery of costs as such is regulated by statute and the method therein pointed out for their collection must be pursued.

Costs—Taxation—Notice—Waiver—Jurisdiction.

4. Where a party, against whom costs awarded on appeal were sought to be recovered under section 1869 of the Code of Civil Procedure, had not been served with a memorandum of such costs, his special appearance, for the purpose of submitting a motion to strike out the memorandum as a whole and also a motion to tax the cost-bill on its merits, did not give the district court jurisdiction to tax the costs, and *certiorari* lies to annul such order.

CERTIORARI in the name of the state, on the relation of J. A. Riddell, against the district court of the second judicial district of the state of Montana and Honorable John B. McClernan, a judge thereof, to review an order taxing costs. Order annulled.

Mr. John J. McHatton, for Relator.

Messrs. Carpenter, Day & Carpenter, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Certiorari. On appeal to this court by the defendants in a cause entitled *Riddell v. Ramsey et al.*, 31 Mont. 386, 78 Pac. 597, a judgment in favor of plaintiff and an order denying defendants' motion for a new trial were reversed. When the *remittitur* went down to the district court, the defendants filed with the clerk their verified memorandum of costs and disbursements on the appeal and caused execution to be issued therefor as upon a judgment under the statute. (Code of Civil Proc., sec. 1869.) Thereupon the plaintiff filed his motion, supported by affidavit, to the effect that a copy of the memorandum had not been served upon him before or after filing, and asked that the execution be stayed pending a decision by the court upon the question whether the defendants were entitled to their costs. Ex-

execution was stayed. The plaintiff then moved the court, making special appearance for that purpose, to strike out the memorandum, and at the same time submitted a motion to tax the bill on its merits, making specific objections to various items included therein. The court denied the motion to strike out the memorandum, and thereupon proceeded to consider and determine the motion to tax. Certain of the items were disallowed, with the result that the amount claimed, \$944.05, was reduced to \$652.05. Thereupon this proceeding was begun to have the order taxing costs annulled as in excess of jurisdiction. The writ was issued, and the record certified up.

The contention is made by counsel for relator that, under the rule laid down in *State ex rel. Hurley v. District Court*, 27 Mont. 40, 69 Pac. 244, since no notice of the filing of the memorandum was given under the provisions of section 1867 of the Code of Civil Procedure, the memorandum ought to have been stricken out as a whole. Counsel calls attention to the fact that he made a special appearance for the purpose of asking that the memorandum be stricken out, and that, although he at the same time submitted the merits of plaintiff's claim, thus asking for substantive relief, he did not thereby waive his right to have the relief demanded by his special appearance.

The district court should have stricken out the memorandum or bill as a whole. It was without jurisdiction to tax or allow any item. The respondents rely, of course, on the provisions of section 1869 of the Code of Civil Procedure, and insist that, since the defendants in the case of *Riddell v. Ramsey et al.*, *supra*, complied literally with its requirements and filed their verified memorandum with the clerk within the prescribed time, they were entitled to have execution issue thereon as a matter of course, subject to be recalled on motion of the plaintiff pending a motion to tax. They contend, further, that the provisions of section 1867, touching the service of the memorandum do not apply, for, if notice need not be given, then the court has nothing to do in the premises. The difficulty with this position is that, if the provisions of this lat-

ter section do not apply as to the requirement of notice, neither do they in any other particular. The result is that the party against whom such costs are claimed is without remedy. The memorandum may include all sorts of illegal items, and the party filing it has a judgment for them, without notice or opportunity to his adversary to be heard, before his property may be taken under the execution to satisfy the judgment thus obtained without notice. If this meaning is to be given that section, it would, it seems, be clearly obnoxious to the constitutional guaranty that no person shall be deprived of life, liberty, or property without due process of law (Constitution, Article III, sec. 27), the phrase "due process of law" including notice and a hearing before judgment. (*Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. ed. 215.)

We do not think it necessary to hold section 1869 unconstitutional. The chapter of which this section is a part has to do with costs and the mode by which they may be collected. Section 1867 points out the mode to be pursued for the collection of costs in the district courts, and also in original proceedings in this court; at least it does not in terms apply to district courts exclusively. Section 1869 points out the mode by which they may be collected when awarded on appeal; but we think that all the analogies, as was stated in *State ex rel. Hurley v. District Court, supra*, require notice of the claim to be given under the provisions of section 1867, or that they should be denied.

While the exact point now before the court was not raised in *State ex rel. Hurley v. District Court, supra*, yet what was there said as to the necessity of notice was not entirely impertinent and is wholly applicable in this case. This rule must govern or the conclusion is inevitable that section 1869 is invalid, and that parties have no means provided by which they may collect costs awarded to them by this court on appeal. Section 1867 clearly does apply to proceedings in this court in some respects. We think it must be held to apply also to the method of claiming in the district court costs awarded by this court on appeal, and that the method pointed out must

be pursued, else the court has no power to settle controversies in any manner concerning them.

Nor do we think the relator, by submitting the motion to tax along with his motion to strike out the memorandum as a whole, gave the court jurisdiction of the subject matter. Costs, as costs, are allowed only by statute, and can be collected only by the method pointed out by the statute. (*Orr v. Haskell*, 2 Mont. 350; *Riddell v. Harrell*, 71 Cal. 254, 12 Pac. 67; *O'Neil v. Donahue*, 57 Cal. 226; *Sellick v. De Carlow*, 95 Cal. 644, 30 Pac. 795; *Dow v. Ross*, 90 Cal. 562, 27 Pac. 409.) When, therefore, the party claiming costs has failed to claim them as directed by the statute, his right to them has not attached, and the court has no other power in the premises than to strike out and disallow them on motion of the adverse party.

For these reasons we think that the district court, in proceeding to tax and allow any portion of the bill in controversy, was wholly without jurisdiction, and the order must be annulled.

At the hearing no question was made as to the remedy. We have therefore considered the case upon the merits, without reference to the question whether the proper remedy has been invoked in this case.

Order annulled.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

MEMORANDA

OF

DECISIONS RENDERED WITHOUT WRITTEN OPINIONS DURING THE PERIOD EMBRACED IN THIS VOLUME.

No. 2,223.—THE STATE OF MONTANA *EX REL.* H. A. MISER, RELATOR, *v.* SIXTH JUDICIAL DISTRICT COURT AND HON. FRANK HENRY, JUDGE THEREOF, RESPONDENTS.

Original application for writ of supervisory control.

Decided July 14, 1905.

PER CURIAM.—Relator's application for writ of supervisory control is hereby denied.

Mr. A. P. Heywood, for Relator.

No. 2,209.—ANTON CARLSON, RESPONDENT, *v.* C. M. DORRANCE, APPELLANT.

Appeal from Cascade County; Jere B. Leslie, Judge.

Decided October 10, 1906.

PER CURIAM.—Respondent's motion to dismiss the appeals herein is sustained and the appeals dismissed.

Mr. Thos. E. Brady, for Appellant.

Mr. John W. Stanton, for Respondent.

No. 2,156.—MISSOULA WATER CO., RESPONDENT, *v.* C. E.
AND JENNIE WILLIAMS, APPELLANTS.

Appeal from Missoula County; F. C. Webster, Judge.

Decided October 12, 1905.

PER CURIAM.—Upon motion of counsel for respondent, this cause is hereby dismissed without prejudice to the appellants.

Messrs. McConnell & McConnell, for Appellants.

Messrs. Woody & Woody, Messrs. Marshall & Stiff, and Mr. Wm. Wallace, Jr., for Respondent.

No. 2,195.—STATE OF MONTANA, RESPONDENT, *v.* ISAK
ERICKSON, APPELLANT.

Appeal from Meagher County; W. R. C. Stewart, Judge.

Decided November 1, 1905.

PER CURIAM.—The respondent's motion to dismiss the appeal herein is hereby sustained and the appeal dismissed.

Mr. A. C. Gormley, for Appellant.

Mr. A. J. Galen, Attorney General, for Respondent.

No. 2,248.—THE STATE OF MONTANA *EX REL.* THE NEW MINES SAPPHIRE SYNDICATE, RELATOR, *v.* DISTRICT COURT OF TENTH JUDICIAL DISTRICT AND HON. E. K. CHEADLE, JUDGE THEREOF, RESPONDENTS.

Original application for writ of supervisory control.

Decided November 2, 1905.

PER CURIAM.—Relator's petition for writ of supervisory control is hereby denied.

Mr. Fletcher Maddox, for Relator.

No. 2,250.—THE STATE OF MONTANA *EX REL.* GEORGE MRZLAK, RELATOR, *v.* SECOND JUDICIAL DISTRICT COURT AND HON. GEORGE BOURQUIN, A JUDGE THEREOF, RESPONDENTS.

Original application for writ of review.

Decided November 8, 1905.

PER CURIAM.—The relator's application for a writ of review is hereby denied.

Messrs. Maury & HogevoU, for Relator.

**No. 2,251.—IN THE MATTER OF THE APPLICATION OF GEORGE
MRZLAK FOR WRIT OF HABEAS CORPUS.**

Original application for writ of *habeas corpus*.

Decided November 8, 1905.

PER CURIAM.—Petitioner's application for writ of *habeas corpus* is hereby denied.

Messrs. Maury & HogevoU, for Petitioner.

**No. 2,184.—E. H. O'BRIEN, APPELLANT, v. MAX FRIED,
AND R. FRIED, RESPONDENTS.**

Appeal from Silver Bow County; E. W. Harney, Judge.

Decided December 1, 1905.

PER CURIAM.—Respondents' motion to dismiss the appeal herein is hereby sustained and the appeal dismissed.

Mr. M. J. Cavanaugh, for Appellant.

Mr. L. P. Forestell, and *Mr. I. A. Cohen*, for Respondents.

**No. 2,221.—THOMAS F. ENNIS, RESPONDENT, v. MAURICE
QUIRK ET AL., DEFENDANTS; M. M. GILLEN, APPELLANT.**

*Appeal from District Court, Flathead County; D. F. Smith,
Judge.*

Decided January 4, 1906.

PER CURIAM.—It is ordered that this cause be, and the same is hereby, dismissed as per stipulation of counsel.

Mr. C. H. Foot, and Mr. C. W. Pomeroy, for Appellant.

Mr. Thos. D. Long, for Respondent.

No. 2,266.—THE STATE OF MONTANA EX REL. GEO. MRZ-LAK, RELATOR, v. THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT AND HON. GEO. M. BOURQUIN, A JUDGE THEREOF, RESPONDENTS.

Original application for writ of supervisory control.

Decided January 5, 1906.

PER CURIAM.—The relator's application for a writ of supervisory control herein is hereby denied.

Messrs. Maury & Hogevoil, for Relator.

No. 2,202.—A. P. HENNINGSSEN ET AL., RESPONDENTS, v. ARTHUR THOMAS, APPELLANT.

Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

Decided January 5, 1906.

PER CURIAM.—This cause having been set for hearing this day, and it appearing to the court that briefs have not been filed

and counsel not appearing, it is ordered that the judgment of the court below made and entered on the 4th day of March A. D. 1904, be affirmed at the cost of the appellant.

Mr. J. H. Baldwin, for Appellant.

Messrs. Kirk & Clinton, and *Mr. J. F. Davies*, for Respondents.

No. 2,119.—IN THE MATTER OF THE ESTATE OF JOHN A. DAVIS, DECEASED. GEO. W. DAVIS, APPELLANT.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

Decided January 9, 1906.

PER CURIAM.—This cause having been set for hearing this day, and it appearing to the court that briefs have not been filed and counsel not appearing, it is ordered that the judgment or orders of the court below made and entered on the 19th day of July, A. D. 1904, in the above-entitled matter, be and the same are hereby affirmed at the cost of the appellant.

Mr. Jesse B. Roote, for Appellant.

Mr. E. N. Harwood, for Respondent.

No. 1,328.—THE MONTANA MINING CO., APPELLANT, *v.*
THE ST. LOUIS MINING & M. CO., RESPONDENT.

Appeal from District Court, Lewis and Clark County.

Decided January 9, 1906.

PER CURIAM.—It is hereby ordered that the judgment of the court below made and entered on the 13th day of August, A. D. 1898, be and the same is hereby affirmed at the cost of appellant, in accordance with stipulation of counsel on file herein.

Messrs. Cullen, Day & Cullen, for Appellant.

Messrs. Toole & Bach, for Respondent.

No. 2,272.—IN THE MATTER OF THE APPLICATION OF MATTEO
VALLERO FOR WRIT OF HABEAS CORPUS.

Original application for writ of *habeas corpus*.

Decided January 31, 1906.

PER CURIAM.—Petitioner's application for writ of *habeas corpus* is hereby denied.

Mr. Jesse B. Roote, and *Mr. Peter Breen*, for Petitioner.

No. 2,273.—IN THE MATTER OF THE APPLICATION OF AVILLA
MELVILLE FOR WRIT OF HABEAS CORPUS.

Decided January 31, 1906.

PER CURIAM.—Petitioner's application for writ of *habeas corpus* is hereby denied.

Mr. Jesse B. Roote, and Mr. Peter Breen, for Petitioner.

No. 2,281.—THE STATE OF MONTANA EX REL. JAKE
ROSS, RELATOR, v. DISTRICT COURT OF THE NINTH
JUDICIAL DISTRICT, AND HON. W. R. C. STEWART,
JUDGE THEREOF, RESPONDENTS.

Original application for writ of review.

Decided February 17, 1906.

PER CURIAM.—Relator's petition for writ of review herein is hereby denied.

Messrs. Galen & Mettler, for Relator.



APPENDIX



In Memoriam

DECIUS SPEAR WADE.

In the Supreme Court of the State of Montana, fifth day of October Term, Saturday, October 7, 1905.

(Order of Court.)

The court being advised at this time by a committee of the State Bar Association, of the death of the late Hon. Decius S. Wade, Ex-Chief Justice of the territory of Montana, a committee consisting of all the former members of the Supreme Court of the territory and state of Montana now residing in this state, and also the president of the Montana Bar Association, are hereby appointed to suggest suitable action in commemoration of the life and public service of the deceased. The names of those constituting the committee are the following: Former Chief Justices, Hon. Henry N. Blake, Hon. N. W. McConnell, and Hon. W. Y. Pemberton; former Associate Justices, Hon. Hiram Knowles, Hon. E. J. Conger, Hon. I. C. Bach, Hon. E. N. Harwood, Hon. Wm. H. Hunt, Hon. R. Lee Word, and Hon. Wm. T. Pigott; also William Scallon, Esquire, president of the Montana Bar Association.

Whereupon the committee so appointed reported as follows on October 21, 1905:

TO THE SUPREME COURT OF THE STATE OF MONTANA:

Your Committee appointed to prepare and submit to this Court resolutions relating to Decius S. Wade, formerly the Chief Justice of the Supreme Court of the Territory of Montana, respectfully report the accompanying resolutions and pray that they be approved and entered upon your records:

Resolved, That the members of the Bar of the State of Montana, regretting with profound sorrow the death of the late Chief

Justice Wade and wishing to express in this public manner their appreciation of his virtues in private life and his learning and ability as a jurist, present this memorial for your consideration.

Decius Spear Wade was born in Andover, county of Ashtabula, state of Ohio, upon the twenty-third day of January, 1835. He was educated in the schools of his native town and Kingsville Academy and in his youth learned the lesson of self-reliance by teaching during six winters. He was a student in the office of his distinguished uncle, Hon. Benjamin F. Wade, and admitted to the bar in September, 1857. He was elected Probate Judge of the county of Ashtabula in 1860 and continued in the discharge of its duties seven years. He was chosen in 1869 a member of the Senate, and reiterated his emotions of joy in casting the decisive vote by which the Fifteenth Amendment to the Federal Constitution was ratified by the state of Ohio. He was the Chief Justice of the Supreme Court of the territory of Montana from March 17, 1871, until May 2, 1887, having been nominated for his respective terms by Presidents Grant, Hayes, and Arthur. His opinions in the Appellate Court are published in volumes 1 to 6, inclusive, of the Montana Reports. He was appointed in 1889 a Code Commissioner under the Acts of the Legislative Assembly, and served until the completion of the work in 1892. He passed on at his home in Little Medford, Ohio, upon the fourth day of August, 1905.

Resolved, That Chief Justice Wade, in the performance of his public trust in the District and Supreme Courts of the territory upwards of sixteen years, was governed by a sincere love of law and order, an earnest desire to lay down the correct rules of jurisprudence, and an intense determination to "strike but hear" and deal justly with all parties in litigation.

Resolved, That we rejoice most heartily that his judgments when appealed to the highest tribunal in the Republic, obtained the respect and confidence of the Supreme Court of the United States; that his opinions upon manifold and difficult questions have been cited as safe precedents by courts outside of this jurisdiction and the authors of text-books throughout the land; that

the tremendous power pertaining to his office was wielded to guard life, liberty and property within our boundaries; and that his reputation in these respects has reflected honor of the most exalted degree upon the Courts of Montana.

Resolved, That Chief Justice Wade, as a member of the Code Commission, rendered a service of the utmost value in compiling and securing the enactment of the Codes, and that his capacity and efficiency in this vital undertaking command our approval.

Resolved, That we also cherish the memory of Chief Justice Wade for his manly personal character, his uniform courtesy to all with whom he sustained official relations, his dignity and bearing upon the bench, his kind and noble disposition, incapable of entertaining malice, and his attractive social qualities.

Resolved, That the Clerk of this Court be requested to transmit a copy of these resolutions to the afflicted family of the deceased.

WILLIAM SCALLON,
HENRY N. BLAKE,
N. W. McCONNELL,
W. Y. PEMBERTON,
HIRAM KNOWLES,
E. J. CONGER,
T. C. BACH,
E. N. HARWOOD,
WM. H. HUNT,
R. LEE WORD,
WM. T. PIGOTT,

COMMITTEE.

Honorable Henry N. Blake, former Chief Justice of the Supreme Court of this state, thereupon addressed the court as follows:

MAY IT PLEASE THE COURT:

I am grateful for the privilege of seconding the resolutions submitted by the Committee regarding DECIUS S. WADE, for-

merly Chief Justice of the Supreme Court of the territory of Montana. I was his associate upon the bench during a term exceeding four years, and our relations were of the most intimate character. I am, therefore, a willing witness on this occasion and offer my testimony to his fidelity in the discharge of his important functions, his impartial treatment of litigants and their controversies, his patience in the conduct of judicial investigations, and his attainments in the university of the law. From 1871 to 1887, a long and eventful period in the history of this commonwealth, he filled the most honorable place in our temples of justice. And let us pause and reflect that a majority of our brethren, who took part in his greeting, were garnered in the harvest of death before his departure. The jurisdiction of the territorial courts embraced causes that are now determined in the tribunals of the State and the United States, and the Chief Justice and Associate Justices presided at the sessions of the District Court held in the counties. This era was marked by grand transitions, and the problems solved in the forum were of the most serious and complex nature.

It may be interesting as well as instructive to allude to the obstacles confronting the late Chief Justice in his juridical career and notice briefly his great work. It was his hard fate to live in an age when the mind was made manifest by the hand, and to write opinions, instructions, and papers necessary in the performance of his official tasks, and this manual labor, from which there was no escape, was enormous. Fortunately the advent of the stenographer and typewriter has relieved the judges and lawyers of this day of such drudgery. But the main difficulty was of a far different type, the declaration of sound principles of the law without libraries. Treatises and reports could not be consulted, digests were sometimes misleading, and frequently the final authority of necessity, which was relied on and accepted as conclusive, was the plain common sense of the judge.

The fame of the late Chief Justice is firmly established by the first six volumes of the Montana Reports, wherein he delivered 191 opinions in 415 cases for decision. His judgments in the

trial courts, when the subject of review, were seldom reversed. He prepared elaborate opinions in 17 causes which were carried to the Supreme Court of the United States, and that august body, after a deliberate inquiry into the merits, affirmed the large number of 14. When all the conditions are weighed, his rare success and acumen in distinguishing the right from error in the multitude of issues before him for adjustment must be mentioned with praise.

I am compelled to admit that he had one fault, not uncommon with jurists: the expression of his views in many sentences. Years have passed since the arguments in these contentions were submitted, the passions animating the parties have subsided, and this is the hour for calm criticism. I say without hesitation that the legal doctrines which he upheld, when tested in the scales of justice, have been generally followed. He was ready to listen to both sides in a spirit of fairness and give persons in litigation a square deal, and did not overlook any proposition supported in the briefs.

His services as Code Commissioner are described in appropriate language in the resolutions. I trust I may be pardoned for digressing and asserting that I have read every section of the Codes enacted in 1895, and that it affords me intense satisfaction to maintain in this presence that the commissioners are entitled to the reward of good and faithful servants. Our lamented brother cordially participated in the arduous toil and painstaking care and research involved in their compilation.

He was the member of a family, memorable in war and peace in the annals of our country from the primitive settlements of New England, and his able and assiduous endeavors in a public station for the welfare of the people prove him worthy of his kindred. Various means have been resorted to by eminent men for the purpose of strengthening the mental powers in order that they may be most effective in action. The late Chief Justice enforced this discipline by perusing again and again the luminous commentaries of Blackstone.

In the private walks of life, he was a neighbor according to the Scriptures, a patriotic supporter of good government in

every crisis, and a zealous advocate of the higher education for all mankind. He was controlled by forbearance, anxious to forget and forgive, loyal to his friends, and careful in speech and deed that he might not injure a human being.

The citizens of the territory and state are indebted to him for his record of triumph in the administration and perfection of the law. The historian will inscribe in golden letters upon the priceless roll of the stalwart builders of Montana the thrice illustrious name—DECIVS S. WADE.

Mr. Chief Justice Brantly, in behalf of the court, made the following remarks:

The most remarkable fact in the judicial career of Chief Justice Wade is that, without the assistance of authorities, without the aid of law libraries, he was generally correct in the application of legal principles. He came to the territory of Montana when the conditions were new and the cause of law and order had not been established on firm foundations. He and his associates labored under great disadvantages. Many questions arose during his time when the books did not furnish any light for his guidance. The members of the bar should be inspired by his example when confronted by difficulties, and study with zeal and patience the profound problems of the law. The successful labors of Chief Justice Wade made the task of his successors more pleasant. His opinions are consulted by this court with profitable results. This community, as well as the bench and bar, are under many obligations to him for the results of his untiring industry and for the fidelity with which he discharged his public duties.

It is ordered that the resolutions which have been offered, and in which the members of the court most heartily concur, be spread upon the record to perpetuate the memory, merit and honor of Chief Justice Wade, and that an engrossed copy of them be transmitted to the family of the deceased; and it is further ordered that, as a mark of respect to the deceased, this court stand adjourned until to-morrow morning, October 22, 1905, at 10 o'clock A. M.

INDEX.

ABANDONMENT.

Forcible Entry.

1. Abandonment of the land by plaintiff, in an action for forcible entry, subsequent to the wrong, furnishes no justification of the act complained of; neither is abandonment a pertinent inquiry in such an action.—*Spellman v. Rhode*, 21.

ACCOMPLICES.

See Criminal Law.

ACCOUNTING.

Appeal—Evidence—Findings—Conclusiveness.

1. Where it appeared, in an action for an accounting, that the parties had invested their funds jointly in a common business during a period of over twenty years, without any definite plan or arrangement, without any accounting made or demanded on either side for many years, and with never a settlement, the district court thus being able to do no more than make a reasonably fair estimate as to the amount due from one party to the other, its findings will not be disturbed, since it is impossible to say from the showing made, that the preponderance of the evidence is against them or any of them.—*Union Bank and Trust Co. v. Knobb*, 167.

Pledges—Conversion—Election—Waiver of Tort.

2. Where a pledgor demanded an accounting by the pledgee, not only of the proceeds derived from the use of the property pledged, but also for the price realized from a wrongful sale thereof, and thereafter sued to recover such sums, he thereby waived the pledgee's tort in converting the property.—*Demars v. Hudon*, 170.

Pledges—Equity—Trial by Jury.

3. A suit brought by a pledgor to compel the pledgee to render an accounting of the proceeds derived from the use of the property pledged and to recover the price realized from a wrongful sale thereof, is an action for an accounting cognizable in a court of equity, in which the defendant is not entitled to a jury trial.—*Demars v. Hudon*, 170.

Pledges—Conversion—Interest.

4. Where a pledgee of certain property sold the same on credit, without interest, the pledgor, on ratifying the sale and suing the pledgee for an accounting, was chargeable with interest on the loan secured by the pledge at the agreed rate to the date at which defendant received payment for the property sold sufficient to discharge the indebtedness, and not merely to the date of the sale.—*Demars v. Hudon*, 170.

Trustees—Deed Absolute—Evidence—Directing Verdict.

5. Plaintiff, in an action to obtain a decree declaring defendants trustee for him of the legal title to an undivided interest in a

mining claim, and for an accounting, testified that he had conveyed his interest to defendants under a written agreement signed by one of the defendants to the effect that upon removal of his incapacity occasioned by over-indulgence in drink, the same be returned to him; and that defendants had accounted to him for the rents for a period of two years. The deed from plaintiff to defendants was duly acknowledged and recorded. The alleged agreement was in the handwriting of plaintiff, and neither acknowledged nor recorded. The defendants' evidence tended to show that they had bought the interest, giving in consideration \$1,000 and a one-half interest in another mining claim; that plaintiff never demanded a reconveyance, or an accounting until shortly before the action was brought—a period of ten years, and that they had never accounted to plaintiff. *Held*, that the court was justified by the evidence in directing the jury to find for the defendants to the effect that the conveyance had been made in pursuance of an absolute sale for value.—*Short v. Estey et al.*, 261.

ACCOUNTS STATED.

Claims Against Estates—Founded on Written Instrument.

1. A claim against an estate is not "founded on a bond, bill, note or other instrument," within the meaning of Code of Civil Procedure, section 2607, where it appears to be due upon an oral agreement, the result of which is an account stated.—*Dorais v. Doll et al.*, 314.

ACQUITTAL.

See Criminal Law, 18-21.

ACTIONS.

Partnership—In Firm Name.

1. An action may not be brought in a copartnership or firm name, section 590 of the Code of Civil Procedure, which provides that where persons, associated in business, transact such business under a common name, they may be sued by such common name, having no application to parties plaintiff.—*Doll v. Hennessy Mercantile Co.*, 80.

Against Copartners—Rights of Partners.

2. Since the amount of the firm assets to which a partner is entitled depends on a settlement of the partnership affairs and an adjustment of balances, which can only be determined by a voluntary accounting or by a suit in equity, neither an individual partner, nor a purchaser of his interest, can sue at law to recover such share.—*Doll v. Hennessy Mercantile Co.*, 80.

Contracts—Joint Parties.

3. In an action brought by B. and wife for breach of an agreement to pay to them jointly a certain sum of money, the promisees are necessary parties plaintiff and their action can be joint only.—*Brown et al. v. Daly*, 523.

Executors and Administrators—Claims Against Estate—Presentation.

4. Under Code of Civil Procedure, sections 2606, 2608 and 2610, a claim against an estate must first be presented to the executor or administrator for allowance or rejection before action can be brought to enforce such claim. B. and wife, in an action against the executrix of an estate for the breach of an agreement, entered into with them by decedent, to pay to them jointly a certain sum of money, alleged that each had presented to the executrix a separate claim for half the

amount sued for and that the claims had been rejected: *Held*, that plaintiffs, never having presented a joint claim against the estate, could not maintain a joint action based upon the presentation and rejection of their separate claims.—*Brown et al v. Daly*, 523.

ADMINISTRATORS.

See, also, Probate Proceedings.

Claims Against Estates—Affidavits.

1. A claim against an estate was supported by an affidavit closing with the words "to the knowledge of said claimant," instead of "to the knowledge of the affiant," the words used in section 2604 of the Code of Civil Procedure. An objection was interposed that the claim was not properly verified. *Held*, that when the claimant acts for himself, the word "claimant" in the affidavit accompanying the claim meets all the requirements of the statute, and that it is only when some one acts in behalf of the claimant that the statement must be "to the knowledge of the affiant."—*Dorais v. Doll et al.*, 314.

Claims Against Estates—Founded on Written Instruments.

2. A claim against an estate is not "founded on a bond, bill, note or other instrument," within the meaning of Code of Civil Procedure, section 2607, where it appears to be due upon an oral agreement, the result of which is an account stated.—*Dorais v. Doll et al.*, 314.

Rejection of Claims Against Estates—Indorsement.

3. The presentation of a claim against an estate at the office of the attorney of the estate, in accordance with a published notice to creditors, and the indorsement of the claim by the attorney, under the direction of the administrator, as having been "rejected," and signing the administrator's name, sufficiently comply with Code of Civil Procedure, section 2606, which provides that when a claim is presented to an executor or administrator, "he must indorse thereon his allowance or rejection."—*Dorais v. Doll et al.*, 314.

Witnesses—Competency—Transactions with Decedents.

4. Under Act of 1897 (Sessions Laws, 1897, page 245), the assignee of a claim against an estate cannot be a witness in an action against the administrator to recover on the claim.—*Dorais v. Doll et al.*, 314.

Actions Against—Evidence—Exclusion—Waiver.

5. In an action against the administrator of an estate to recover on negotiable paper, plaintiff's offered testimony was excluded as incompetent, under the provisions of section 3162 of the Code of Civil Procedure, as amended by Session Laws, 1897, page 245. Proof of decedent's testimony on a former trial was then introduced. The preservation of decedent's testimony had not been made to appear to the court up to the time of its introduction. *Held*, that by failure to renew his offer after the court had been made cognizant of the preservation of decedent's testimony, plaintiff waived any error in excluding the testimony in the first instance.—*Harrington v. Butte & Boston M. Co. et al.*, 330.

Claims Against Estate—Presentation—Actions.

6. Under Code of Civil Procedure, sections 2606, 2608 and 2610, a claim against an estate must first be presented to the executor or administrator for allowance or rejection before action can be brought to enforce such claim. B. and wife, in an action against the executrix of an estate for the breach of an agreement, entered into with them by decedent, to pay to them jointly a certain sum of money, alleged

that each had presented to the executrix a separate claim for half the amount sued for and that the claims had been rejected: *Held*, that plaintiffs, never having presented a joint claim against the estate, could not maintain a joint action based upon the presentation and rejection of their separate claims.—*Brown et al. v. Daly*, 523.

ADVERSE CLAIMS.

See Equity, 6; Mines and Mining, 11, 12.

AFFIDAVITS.

Mechanics' Liens—Verification—Insufficiency.

1. A verification, attached to a mechanic's lien (section 2131, Code of Civil Procedure, as amended by Laws 1901, p. 162), and executed by the president of a corporation in its behalf, stating "that the matters and things therein stated are true, *to the best of his knowledge, information and belief*," is not an affidavit and therefore insufficient for the purpose intended.—*Western Plumbing Co. v. Fried*, 7.

Administrators—Claims Against Estates.

2. A claim against an estate was supported by an affidavit closing with the words "to the knowledge of said claimant," instead of "to the knowledge of the affiant," the words used in section 2604 of the Code of Civil Procedure. An objection was interposed that the claim was not properly verified. *Held*, that when the claimant acts for himself, the word "claimant" in the affidavit accompanying the claim meets all the requirements of the statute, and that it is only when some one acts in behalf of the claimant that the statement must be "to the knowledge of the affiant."—*Dorais v. Doll et al*, 314.

AGENCY.

See, also, Principal and Agent.

Special Agents.

1. One to whom a money order was given by another, with instructions to see if it was all right, and, if so, to get it cashed, was a special agent of the latter, within the meaning of Civil Code, section 3072.—*Moore v. Skyles*, 135.

Scope of Authority of Agent—Duty of Ascertaining.

2. All persons dealing with an agent are bound to ascertain the scope of the agent's authority, and if they do not, they deal with him at their peril.—*Moore v. Skyles*, 135.

Postoffice Money Orders—Transfer—Title of Transferee.

3. Section 4037, United States Revised Statutes, provides that more than one indorsement of a money order shall render the same invalid. Defendant was the indorsee of a money order which he sent by an agent to the postoffice on which it was drawn in order to get it cashed. The agent sold the order to plaintiff, indorsing it with his own name. *Held*, that plaintiff obtained no title to the order.—*Moore v. Skyles*, 135.

ALIMONY.

See Divorce, 3.

AMENDMENTS.

See, also, District Courts, 7.

Appeal—Complaint—Insufficiency—Reversal.

1. Where a complaint fails to state a cause of action, and it is apparent that it cannot be amended to do so, the judgment of the trial court in favor of defendant, alleged to be erroneous for other reasons, will not be reversed.—*Brown et al. v. Daly*, 523.

APPEAL.

See, also, Appealable Orders.

Undertaking—Appeal from More than one Order.

1. *Held*, that, though a single undertaking in the sum of \$300 is sufficient to sustain an appeal from a judgment and from an order denying a new trial, when treated as one appeal, where appeals are taken from a judgment and from any order other than one denying a new trial, or from more than one order, a separate undertaking in the sum of \$300 must be filed for each, or, if both are included in the same paper, appropriate references must be made to show which appeal each is intended to effectuate, even though one of the orders appealed from may be a nonappealable order.—*Pirrie v. Moule et al.*, 1.

Undertaking—When Void and not Susceptible of Amendment.

2. Where a single undertaking on appeal in the sum of \$300 was filed to support separate appeals from a final judgment, from an order denying a new trial, and from a special order after judgment, overruling the defendant's exceptions to the findings of fact and conclusions of law made by the court, instead of a separate bond for each appeal, the undertaking was wholly void for ambiguity, and not merely insufficient, and hence could not be cured under section 1740 of the Code of Civil Procedure, providing that no appeal shall be dismissed for insufficiency of the undertaking if a good and sufficient undertaking approved by a justice of the supreme court, be filed therein before the hearing on motion to dismiss the appeal.—*Pirrie v. Moule et al.*, 1.

Briefs—Waiver of Errors.

3. Matters specified as error on appeal, but not discussed in the brief, will be deemed waived.—*Sayre v. Johnson*, 15.

Forcible Entry—Pleadings—Sufficiency—Theory of Case.

4. Where the case was tried on the theory that the complaint stated a cause of action for a forcible entry under Code of Civil Procedure, section 2080, without objection by either party, its sufficiency will be determined on this theory on appeal, although it contains some allegations more appropriate to an action of ejectment.—*Spellman v. Rhode*, 21.

Review of Evidence—Assignments of Error—Briefs.

5. On appeal from a decree and an order denying a motion for a new trial, in an action to quiet title to ore bodies, the supreme court may review the evidence to determine whether or not it supports the findings and decree, although the order of the trial court denying the motion for a new trial is not specified as error in appellant's brief.—*Hickey et al. v. Anaconda Copper M. Co. et al.*, 46.

Record—Contents—Evidence.

6. Code of Civil Procedure, section 1173, does not require that the record on appeal must show that it embraces all the evidence intro-

duced at the trial of the case, but only such as is necessary to make the statement truly represent the case.—Hickey et al. v. Anaconda Copper M. Co. et al., 46.

Record—Exhibits—Certificate of Judge—Imports Verity.

7. In the absence of any showing that exhibits, alleged to have been omitted from the record on appeal are material to the consideration of the appeal, the certificate of the presiding judge will be accepted by the appellate tribunal as importing verity, and the statement considered as containing all the matter necessary to make it truly represent the case.—Hickey et al. v. Anaconda Copper M. Co. et al., 46.

Orders—When Final.

8. While an order upsetting a verdict vacates a judgment, still such an order is not final until after the time for appeal therefrom has passed or until the appeal is determined.—Coombs et al. v. Barker et al., 74.

From Order Granting New Trial—Execution—Stay.

9. Under Code of Civil Procedure, section 1733, providing that the filing of an appeal bond of \$300 stays all proceedings in the trial court "on the judgment or order appealed from," where both parties appealed from an order granting a new trial in part, a bond executed on the appeal did not stay the execution of the judgment.—Coombs et al. v. Barker et al., 74.

Insufficiency of Evidence—New Trial.

10. The supreme court will not ordinarily determine whether the evidence is insufficient to sustain the verdict, when a new trial is ordered for errors committed during the trial.—Doll v. Hennessy Mercantile Co., 80.

New Trial—Joint Motion—Insufficiency of Evidence—Assignment of Error as to One Defendant.

11. In an action against joint defendants for goods sold and delivered, where the issue of fact was whether the person who purchased the goods was authorized to do so as agent for defendants, an assignment of error that the evidence was insufficient to sustain the verdict as to one defendant did not call for a new trial as to both defendants, and a joint motion for a new trial, so far as based on such assignment, was properly overruled.—Capital Lumber Co. v. Barth et al., 94.

Trial—General Verdicts—Disregard of Findings.

12. Where the district court, in an action for debt, entered judgment upon a general verdict, and in doing so, ignored certain special findings which were contradictory and inconsistent the appellants, for failure to object to the court's action or to move for judgment upon the findings, are precluded from complaining of the inconsistencies in the findings for the first time on appeal.—Capital Lumber Co. v. Barth et al., 94.

Criminal Law—Justices' Courts—Notice—County Attorneys.

13. Failure to serve notice upon the county attorney of an appeal to the district court from a judgment of conviction had in a justice's court is not ground for the dismissal of the appeal.—State ex rel. Hodgdon v. District Court, 119.

Criminal Law—Justices' Courts—Undertaking—Necessity.

14. An undertaking on appeal from a judgment of conviction for a misdemeanor, rendered by a justice of the peace, imposing a fine and remanding defendant to the county jail until such fine be paid,

is not necessary to confer jurisdiction on the district court to entertain the appeal.—*State ex rel. Hodgdon v. District Court*, 119.

Undertaking—When Necessary.

15. An undertaking on appeal, being purely a statutory regulation, may not be exacted unless the statute specifically makes such requirement.—*State ex rel. Hodgdon v. District Court*, 119.

Practice—Record—Evidence.

16. When the question raised by appellant has to do with the admissibility of a particular item of evidence which, if not rejected, would have tended to prove the issue, the record need not contain all the evidence.—*Mackel v. Bartlett*, 123.

Errors Reviewed.

17. The supreme court on appeal will review only the errors presented by the appellant, not those suggested by respondent.—*Mackel v. Bartlett*, 123.

Nonsuit—Review—Scope.

18. On appeal from an order of nonsuit, the sufficiency of the complaint will not be considered, where it was not made a ground of the motion as submitted to the trial court.—*Mackel v. Bartlett*, 123.

Conflicting Evidence—Verdict.

19. Where the evidence is conflicting, the verdict will not be disturbed on appeal.—*Lehman v. Knapp*, 133.

Accounting—Evidence—Findings—Conclusiveness.

20. Where it appeared, in an action for an accounting, that the parties had invested their funds jointly in a common business during a period of over twenty years without any definite plan or arrangement, without any accounting made or demanded on either side for many years, and with never a settlement, the district court thus being able to do no more than make a reasonably fair estimate as to the amount due from one party to the other, its findings will not be disturbed, since it is impossible to say from the showing made, that the preponderance of the evidence is against them or any of them.—*Union Bank & Trust Co. v. Knobb*, 167.

Appealable Orders—Prohibition—Motion to Quash—Demurrer.

21. Under Code of Civil Procedure, section 1722, as amended by Session Laws, 1899, page 146, neither an order sustaining a demurrer, nor an order sustaining a motion to quash an alternative writ of prohibition is appealable.—*State ex rel. Allen v. Hawkins et al.*, 177.

Election Contests—Exhibits—Marked Ballots.

22. *Held*, on appeal from a judgment in an election contest, that ballots, alleged to have been used on the trial and brought to the supreme court in a box to which was attached a memorandum of the trial judge to the effect that he had received the box from the clerk of the district court, had never opened it, but believed that it contained the original ballots, may not be looked to for the purpose of ascertaining whether any of said ballots bear distinguishing marks, because not identified as the original ballots in their original form as introduced in evidence in the court below, and because of the absence of a certificate of the judge to that effect. (Rule VIII, Subd. 1, Rules of Supreme Court.)—*Pledge v. Griffith*, 191; *Pledge v. Tweedie*, 197.

Briefs—Failure to File—Non-Appealance of Counsel—Effect.

23. Where on the day set for hearing an appeal in the supreme court, appellant's brief is not on file and his counsel fails to appear to be heard, the judgment of the district court will be affirmed at the cost of appellant.—*Henningesen et al. v. Thomas*, 538; *In re Davis' Estate*, 539.

Questions Reviewable—Judgment not Appealed from.

24. Where a judgment of foreclosure subject to certain conditions was rendered against defendants, who did not appeal therefrom, the supreme court could not, on plaintiff's appeal from the part of the judgment imposing the conditions, consider whether the mortgage could be lawfully foreclosed in view of the invalidity of the contract out of which the conditions imposed by the lower court arose.—*Keely v. Gregg et al.*, 216.

Briefs.

25. (On motion for rehearing.) Errors not assigned in the briefs of counsel will not be considered on appeal.—*In re Tuohy's Estate*, 230.

Rehearing.

26. (On motion for rehearing.) The fact that the supreme court did not, on the original hearing, consider and decide a question not assigned in the brief and not properly before it, is not ground for rehearing.—*In re Tuohy's Estate*, 230.

Instructions Favorable to Appellant—Effect.

27. A judgment will not be reversed for errors in instructions which are in favor of appellant.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Personal Injuries—Excessive Damages—Burden of Showing Error.

28. The burden of showing error on the ground of excessive damages awarded in a personal injury case rests upon appellant, and in the absence of a clear showing the supreme court will not interfere.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Personal Injuries—Excessive Damages—Evidence.

29. Where, in an action for personal injuries, the evidence was such that the jury might have found that the injuries sustained were permanent, and that plaintiff, who was forty-five years of age and had previous to the accident earned \$3.50 per day, would not thereafter be able to earn money, a verdict of \$20,000 in his favor will not be set aside on appeal as excessive.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Amendments—Continuance—District Courts—Discretion.

30. Under Code of Civil Procedure, section 774, it was within the court's discretion to permit an amendment to a complaint after the cause had been called for trial and deny a motion for postponement, where it did not appear that movant was surprised by the presentation of an issue which he was not prepared to meet, or that he did not meet it with all the evidence available in any event; and, on appeal in the absence of an affirmative showing of prejudice, the assignment of error in this respect will be held without merit.—*Dorais v. Doll et al.*, 314.

Briefs—Assignments of Error—Rules.

31. Errors not assigned in appellant's brief, in accordance with subdivision 3 of Rule X of the Rules of the Supreme Court but only called to the court's attention on oral argument, will not be considered on appeal.—*Dorais v. Doll et al.*, 314.

Record—Omission of Judgment—Dismissal.

32. An appeal from the judgment will be dismissed, where the only reference in the record that a final judgment had been entered, appears in a copy of the notice of appeal; since, in order to give the supreme court jurisdiction, the record must contain a copy of the judgment. (Code Civ. Proc., secs. 1176, 1736; Session Laws, 1899, p. 146.)—*State ex rel. Bank v. Taylor*, 364.

Variance.

33. The question of variance will not be considered when raised for the first time on appeal.—*Kalispell Liquor & Tobacco Co. v. McGovern et al.*, 394.

District Courts—Costs—Briefs.

34. District courts do not possess the power, on a motion to tax the costs of an appeal, to disallow an item for supplemental briefs used in the appellate court, the question of the necessity of such briefs being one for the supreme court to decide.—*Montana Ore Pur. Co. v. Boston & Mont. C. C. & S. M. Co.*, 400.

District Courts—Costs—Transcript.

35. District courts have no power to say, on a motion to tax the costs of an appeal, that any portion of the transcript on appeal should have been omitted as unnecessary, the supreme court being the exclusive judge of what the record on appeal shall contain in order to present appellant's case to it for review.—*Montana Ore Pur. Co. v. Boston & Mont. C. C. & S. M. Co.*, 400.

Transcript—Printing by Contract—Cuts—Improper Charge.

36. The district court, on a motion to tax the costs of an appeal, properly struck out an item charged for cuts used in the printed transcript and made expressly for that purpose, where the printing was done by contract at a certain rate per page, since the contract price only was properly chargeable.—*Montana Ore Pur. Co. v. Boston & Mont. C. C. & S. M. Co.*, 400.

Costs—Remittitur—Supreme Court Opinion—Copy.

37. Where a judgment or order of the trial court is reversed or modified a copy of the opinion of the supreme court must accompany the remittitur. (Rule XIX of Supreme Court, 30 Mont. xlii, and it was error for the district court, on a motion to tax the costs of an appeal, to disallow an item charged for a copy of such opinion.—*Montana Ore Pur. Co. v. Boston & Mont. C. C. & S. M. Co.*, 400.

Necessary Disbursements—What Constitutes.

38. Disbursements necessarily made to secure the review of a case are a part of the costs necessarily incurred.—*Mont. Ore Pur. Co. v. Boston & Mont. C. C. & S. M. Co.*, 400.

Instructions—Request for—Record.

39. Where the record is silent as to what, if any, instructions were requested by appellant upon specific points in an action for breach of contract, he cannot complain that those submitted were not as specific as they should have been.—*Great Falls Meat Co. v. Jenkins*, 417.

Conflict in Evidence—Result.

40. The judgment of the district court will not be disturbed on appeal on the ground of insufficiency of the evidence, where a substantial conflict on material issues is shown, and where upon a re-examination of it by the trial court a new trial was refused.—*Great Falls Meat Co. v. Jenkins*, 417.

From Judgment—Review—Appealable Orders.

41. Under Code of Civil Procedure, section 1742, the supreme court cannot, on appeal from the judgment, review an order from which an appeal could have been taken.—*Great Falls Meat Co. v. Jenkins*, 417.

Erroneous Reasons for Correct Conclusion—Affirmance.

42. If correct, the conclusion of a district court will not be disturbed on appeal even though its reasons in arriving at it were erroneous.—*Rosenbaum Bros. & Co. v. Ryan Bros. Cattle Co.*, 424.

New Trial—When Order Granting will be Affirmed.

43. Where the order sustaining a motion for a new trial is general, it will not be disturbed on appeal if it can be sustained upon any ground of the motion.—*Beasley v. Berry et al.*, 477.

Mines—Adverse Claims—Review—Exhibits—Maps—Record.

44. Where, in a suit to determine an adverse claim to mining property, maps are used in connection with the oral testimony of witnesses, identifying marks should be placed upon the maps, with proper references to such marks in the record, so as to make any allusion to them by the witnesses intelligible to the appellate tribunal in reviewing the evidence.—*Kirby v. Higgins et al.*, 518.

Complaint—Insufficiency—Amendments—Reversal.

45. Where a complaint fails to state a cause of action, and it is apparent that it cannot be amended to do so, the judgment of the trial court in favor of defendant, alleged to be erroneous for other reasons, will not be reversed.—*Brown et al. v. Daly*, 523.

District Courts—Trial—Exclusion of Evidence.

46. If the trial court's ruling upon the exclusion of evidence is correct, the reason upon which it is founded is immaterial.—*Brown et al. v. Daly*, 523.

APPEAL BONDS.

See Bonds.

APPEALABLE ORDERS.

Motion to Quash—Demurrer—Prohibition.

1. Under Code of Civil Procedure, section 1722, as amended by Session Laws, 1899, page 146, neither an order sustaining a demurrer, nor an order sustaining a motion to quash an alternative writ of prohibition is appealable.—*State ex rel. Allen v. Hawkins et al.*, 177.

Attachment—Motion to Dissolve—Costs.

2. Plaintiff, in an action for damages for breach of a contract to deliver certain beef cattle, caused an attachment to issue and to be levied upon some of the cattle. Defendant moved to dissolve the attachment, which motion was overruled. Defendant did not appeal from this order. *Held*, that owing to his failure to appeal from the order refusing to dissolve the attachment—an appealable order—(Session Laws, 1899, page 146), defendant cannot be heard to complain, on appeal from the judgment, of that part of it which reimbursed plaintiff for the reasonable and necessary expense incurred by him in caring for the property.—*Great Falls Meat Co. v. Jenkins*, 417.

Appeal from Judgment—Review.

3. Under Code of Civil Procedure, section 1742, the supreme court cannot, on appeal from the judgment, review an order from which an appeal could have been taken.—*Great Falls Meat Co. v. Jenkins*, 417.

ASSIGNMENT.**Claims against Estates—Evidence—Rejection—Objection.**

1. An objection to testimony of an assignment of a claim against an estate, which went to any testimony as to the assignment, whereas the purpose of counsel in making the objection was to exclude oral evidence of it for the reason that it had been made in writing, was too broad, since, by sustaining the objection as made, proof of the assignment would have been impossible while it would have been proper to limit the effect of the evidence, by reason of the failure of counsel for appellant to so request, he may not complain of the ruling as made.—*Dorais v. Doll et al.*, 314.

Assignees—Witnesses—Competency—Transactions with Decedents.

2. Under Act of 1897 (Session Laws, 1897, page 245), the assignee of a claim against an estate cannot be a witness in an action against the administrator to recover on the claim.—*Dorais v. Doll et al.*, 314.

Claims against Estates—Evidence—Sufficiency—Findings.

3. Evidence of an oral assignment of a claim, to which no legal objection was interposed, was sufficient to justify a finding that the assignee was the owner of the claim, though there was a written assignment which had been lost, and though the best evidence was not introduced.—*Dorais v. Doll et al.*, 314.

ASSUMPTION OF RISK.

See Personal Injuries.

ATTACHMENT.**Dismissal—Duty of Sheriff.**

1. *Held*, that, under sections 903 and 911 of the Code of Civil Procedure, on the dismissal of an attachment, the sheriff is bound to account to the successful defendant for moneys collected under the attachment from such defendant's debtor.—*Michener v. Fransham*, 108.

Dismissal—Recovery of Property—Burden of Proof.

2. *Held*, that where an attachment suit against joint defendants was dismissed as to one of them, who thereupon brought suit against the sheriff to recover money collected by the latter under the attachment, the burden was on such defendant to show that the money belonged to himself, after which the burden was cast upon the sheriff to show, if he could that such was not the fact, but that he was entitled to hold the money to apply upon any judgment which the attachment plaintiff might recover against the other attachment defendant.—*Michener v. Fransham*, 108.

Motion to Dissolve—Appealable Orders—Costs.

3. Plaintiff, in an action for damages for breach of a contract to deliver certain beef cattle, caused an attachment to issue and to be levied upon some of the cattle. Defendant moved to dissolve the attachment, which motion was overruled. Defendant did not appeal from this order. *Held*, that owing to his failure to appeal from the

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order refusing to dissolve the attachment—an appealable order—(Session Laws, 1899, page 146), defendant cannot be heard to complain, on appeal from the judgment, of that part of it which reimbursed plaintiff for the reasonable and necessary expense incurred by him in caring for the property.—*Great Falls Meat Co. v. Jenkins*, 417.

ATTORNEYS.

Privileged Communications.

1. Information obtained by an attorney from the defendant, in an action brought by a trustee in bankruptcy to recover the amount of an alleged preference, who, while introducing to the attorney the person who made the preference and who was then in search of legal advice, made certain statements in relation to the business affairs of the persons so introduced, is not privileged, since the relation of attorney and client did not exist between the defendant and the legal adviser at the time the statements were made; and the supreme court upon review is not bound to accept the assertion of the attorney that "*they* called upon me for the purpose of obtaining my services as an attorney at law" as conclusive.—*Mackel v. Bartlett*, 123.

Administrators—Rejection of Claims against Estates—Indorsement.

2. The presentation of a claim against an estate at the office of the attorney of the estate, in accordance with a published notice to creditors, and the indorsement of the claim by the attorney, under the direction of the administrator, as having been "rejected," and signing the administrator's name, sufficiently comply with the Code of Civil Procedure, section 2606, which provides that when a claim is presented to an executor or administrator, "*he* must indorse thereon his allowance or rejection."—*Dorais v. Doll et al.*, 314.

Disbarment—Unprofessional Conduct—Acting as Counsel for Both Parties—Deceit.

3. C., an attorney, acted in his official capacity for a woman in bringing about her marriage to her seducer. Five days later an agreement was entered into between both in the attorney's office to have the marriage annulled for monetary considerations. Soon thereafter the suit for the annulment of the marriage was commenced by the same attorney, appearing for the husband. Prior thereto the attorney had obtained a paper from the wife, executed in blank purporting to be a designation of an attorney to represent her in the annulment proceedings. The name of an attorney was inserted in the blank by C. Neither the agreement to have the marriage annulled nor the circumstances under which the marriage was brought about, were called to the attention of the court by C. *Held*, that C.'s conduct was unprofessional and contrary to the principles of fair dealing, in that he acted as attorney for both parties in the same cause, and deceived the court in not acquainting it with all the facts connected with the case.—*In re Carleton*, 431.

Disbarment—Disqualification of Judge—False Affidavit.

4. An attorney, employed by a woman in a divorce proceeding, who, in order to delay the trial of the cause, mailed to his client an affidavit of disqualification charging bias and prejudice on the part of the district judge (Laws 1903, Second Extra. Session, p. 9), to be signed by her if she saw fit to do so, where it did not appear that either the attorney or the client thought that the judge was so prejudiced, was guilty of unprofessional conduct.—*In re Carleton*, 431.

Disbarment—Divorce—Alimony—Counsel Fees—Unprofessional Conduct.

5. The conduct of an attorney who entered into a contract with his client, in a divorce proceeding, whereby he was to receive, in addition to the attorney's fee that might be allowed him by the court, a portion of all moneys received by the client as alimony, and who failed to call such agreement to the court's attention, prior to the making of the order allowing counsel fees, is reprehensible, and in violation of his duty as a member of the bar.—In re Carleton, 431.

Disbarment—Forgery—Evidence.

6. To warrant a finding against the accused in a disbarment proceeding, on a charge of forgery of an undertaking on attachment, the evidence must be clear and definite.—In re Thresher, 441.

Disbarment—Supreme Court—Jurisdiction—Crimes and Misdemeanors.

7. The supreme court has exclusive jurisdiction in a disbarment proceeding to hear the evidence and determine the truth of charges of crimes and misdemeanors involving moral turpitude whether committed within this jurisdiction or not, and whether within or without the sphere of official duty.—In re Thresher, 441.

Disbarment—Crimes Falling Without Sphere of Official Duty.

8. Where the crime charged against an attorney in a disbarment proceeding, falls clearly without the sphere of official duty, it is discretionary with the supreme court to hear and determine it upon the merits prior to a criminal prosecution and conviction in the proper court.—In re Thresher, 441.

Disbarment—When Supreme Court Will not Take Jurisdiction.

9. The supreme court will refuse to entertain an accusation against an attorney in a disbarment proceeding, where the crime charged falls clearly without the sphere of official duty, unless urgent reasons are shown why it should do so.—In re Thresher, 441.

Disbarment—District Courts—Criminal Proceedings.

10. Where the conduct charged as ground for the disbarment of an attorney falls within the sphere of official duty the supreme court will hear and determine the matter, regardless of the fact that it amounts to an offense against the criminal laws of the state, and will not wait to inquire whether criminal proceedings have been instituted and prosecuted to a conclusion.—In re Thresher, 441.

Disbarment—Nature of Proceeding.

11. A proceeding in disbarment is in no sense a criminal investigation, but its purpose is to ascertain whether the accused attorney is worthy of confidence and possessed of that good moral character which is a condition precedent to the privilege of practicing law and of continuing in the practice thereof.—In re Thresher, 441.

Disbarment—Forgery.

12. An attorney into whose hands a check for \$49.60, payable to a justice of the peace, had been placed by a client to cover the expenses of an appeal from a justice of the peace to the district court, and who thereupon forging the indorsement of the justice, obtained the money and appropriated it to his own use, the client thus failing to secure the appeal, is unworthy of confidence and guilty of conduct which merits disbarment.—In re Thresher, 441.

Disbarment—Deceit.

13. An attorney who, after securing an order of court to that effect, withdrew the sum of \$414.90 deposited by the client with a clerk of court as a tender, after final disposition of the action by the supreme

dicates to the officers of the bank the source from which the moneys came. After the administrator's removal by the district court and the appointment of a special administrator for certain of the estates, the latter brought suit against the bank to recover a balance of \$2,539.02 remaining to the credit of the defaulting public administrator. The court found that this sum belonged to one certain estate. *Held*, that in so finding the court erred, since the funds, when mingled in one general deposit in the bank, lost their identity, and that it was therefore impossible for the court to say that they belonged to any particular estate.—*Raban v. Cascade Bank*, 413.

BIAS AND PREJUDICE.

See District Courts, 2; Attorneys, 4.

BILLS OF EXCEPTIONS.

See, also, Record; Costs, 4, 5.

BONA FIDE PURCHASER.

Partnership—Sale of Entire Stock by One Partner.

1. Under Civil Code, section 3232, subsection 3, declaring that a partner has no authority to dispose of the whole of the partnership property at once, the purchaser acquires no title as against a non-assenting partner, regardless of the good faith of the purchaser or his want of knowledge of the complaining partner's interest in the property sold, or of the copartner's wrongdoing.—*Doll v. Hennessy Mercantile Co.*, 80.

BONDS.

See, also, School Lands.

On Appeal—Appeal from More than One Order.

1. *Held*, that, though a single undertaking in the sum of \$300 is sufficient to sustain an appeal from a judgment and from an order denying a new trial, when treated as one appeal, where appeals are taken from a judgment and from any order other than one denying a new trial, or from more than one order, a separate undertaking in the sum of \$300 must be filed for each, or, if both are included in the same paper, appropriate references must be made to show which appeal each is intended to effectuate, even though one of the orders appealed from may be a nonappealable order.—*Pirrie v. Moule et al.*, 1.

On Appeal—When Void and not Susceptible of Amendment.

2. Where a single undertaking on appeal in the sum of \$300 was filed to support separate appeals from a final judgment, from an order denying a new trial, and from a special order after judgment, overruling the defendant's exceptions to the findings of fact and conclusions of law made by the court, instead of a separate bond for each appeal, the undertaking was wholly void for ambiguity, and not merely insufficient, and hence could not be cured under section 1740 of the Code of Civil Procedure, providing that no appeal shall be dismissed for insufficiency of the undertaking if a good and sufficient undertaking, approved by a justice of the supreme court, be filed therein before the hearing on motion to dismiss the appeal.—*Pirrie v. Moule et al.*, 1.

Appeal from Order Granting New Trial—Execution—Stay.

3. Under Code of Civil Procedure, section 1738, providing that the filing of an appeal bond of \$300 stays all proceedings in the trial court "on the judgment or order appealed from," where both parties appealed from an order granting a new trial in part, a bond executed on the appeal did not stay the execution of the judgment.—*Barker et al. v. Coombs et al.*, 74.

Criminal Law—Justices' Courts—Appeals.

4. An undertaking on appeal from a judgment of conviction for a misdemeanor, rendered by a justice of the peace, imposing a fine and remanding defendant to the county jail until such fine be paid, is not necessary to confer jurisdiction on the district court to entertain the appeal.—*State ex rel. Hodgdon v. District Court*, 119.

On Appeal—When Necessary.

5. An undertaking on appeal, being purely a statutory regulation, may not be exacted unless the statute specifically makes such requirement.—*State ex rel. Hodgdon v. District Court*, 119.

BRIEFS.

See, also, Costs, 7.

Appeal—Waiver of Errors.

1. Matters specified as error on appeal, but not discussed in the brief, will be deemed waived.—*Sayre v. Johnson*, 15.

Appeal—Review of Evidence—Assignments of Error.

2. On appeal from a decree and an order denying a motion for a new trial, in an action to quiet title to ore bodies, the supreme court may review the evidence to determine whether or not it supports the findings and decree, although the order of the trial court denying the motion for a new trial is not specified as error in appellant's brief.—*Hickey et al. v. Anaconda Copper M. Co. et al.*, 46.

Appeal—Failure to File—Non-appearance of Counsel—Effect.

3. Where on the day set for hearing an appeal in the supreme court, appellant's brief is not on file and his counsel fails to appear to be heard, the judgment of the district court will be affirmed at the cost of appellant.—*Henningsen et al. v. Thomas*, 538; *In re Davis' Estate*, 539.

Appeal—Errors.

4. (On motion for rehearing.) Errors not assigned in the briefs of counsel will not be considered on appeal.—*In re Tucky's Estate*, 230.

Appeal—Assignments of Error—Rules.

5. Errors not assigned in appellant's brief, in accordance with subdivision 3 of Rule X of the Rules of the Supreme Court, but only called to the court's attention on oral argument, will not be considered on appeal.—*Dorais v. Doll et al.*, 314.

BROKERS.**Real Estate—Contracts—Statutes of Frauds.**

1. Where it did not appear that a broker's contract of employment to sell real estate was in writing, or that any note or memorandum thereof, signed by the party to be charged, had been executed as required by Civil Code, section 2185, subdivision 6, no recovery could be had for services rendered thereon.—*Marshall v. Trerise et al.*, 28.

BURDEN OF PROOF.

New Trial—Statement—Service—Waiver.

1. The burden of proving a waiver of insufficient service of a statement on motion for a new trial rests upon him who alleges it, and the proof must be clear and satisfactory.—*Nord v. Boston & Mont. C. C. & S. M. Co.*, 464.

Personal Injuries—Instructions—Contributory Negligence—Assumption of Risk.

2. An instruction, in an action for personal injuries, which told the jury that the burden was upon defendant to show contributory negligence and assumption of risk, was not objectionable, where in other paragraphs of the charge they were informed that their verdict should be for defendant in case *either* defense was established by a preponderance of the evidence.—*Nord v. Boston & Mont. C. C. & S. M. Co.*, 464.

Personal Injuries—Contributory Negligence—Assumption of Risk.

3. Except in that class of cases of personal injuries where the complaint shows that the proximate cause of the injury was plaintiff's own act, contributory negligence and assumption of risk are affirmative defenses, and the burden of establishing them by a preponderance of the evidence rests upon the defendant.—*Nord v. Boston & Mont. C. C. & S. M. Co.*, 464.

CATTLE.

See Live Stock.

CERTIORARI.

Contempt—Written Charges—District Court—Jurisdiction.

1. *Certiorari* lies to annul an order of the district court punishing relator for contempt, alleged to have been committed in interfering with the distribution of water by a commissioner appointed in pursuance of the Act of 1905 (Session Laws, 1905, p. 144), where written charges were not filed by such commissioner, setting forth in direct language the facts constituting the contempt.—*State ex rel. Flynn v. District Court et al.*, 115.

Contempt—Timely Application.

2. After an order, adjudging one guilty of contempt and imposing punishment, has been made and entered—the district judge thus finally disposing of the matter—an application to the supreme court for a writ of review is not premature, although execution of the order had been suspended to a day certain to allow relator to attend to business of importance.—*State ex rel. Carleton v. District Court et al.*, 138.

Costs—Taxation—Notice—Waiver—Jurisdiction.

3. Where a party, against whom costs awarded on appeal were sought to be recovered under section 1869 of the Code of Civil Procedure, had not been served with a memorandum of such costs, his special appearance, for the purpose of submitting a motion to strike out the memorandum as a whole and also a motion to tax the cost-bill on its merits, did not give the court jurisdiction to tax the costs, and *certiorari* lies to annul such order.—*State ex rel. Riddell v. District Court et al.*, 529.

CHATTEL MORTGAGES.

See Mortgages.

CITIES AND TOWNS.

See Municipal Corporations.

CITIZENSHIP.

See Elections, 5, 6, 7, 8, 9.

CLAIM AND DELIVERY.

Pleadings—Complaint.

1. A complaint in claim and delivery, filed on April 16, 1903, and alleging that on March 21, 1903, plaintiff was the owner of the property, and that on that day it was taken from her possession wrongfully and without her consent by defendant sheriff, is defective, in that it fails to show that plaintiff was the owner or had any right to the possession of the property *at the time the action was commenced*, and subsequent allegations that she demanded the possession of the property and that defendant still unlawfully withholds and detains it do not by implication supply the omission of the substantive allegation necessary to show the right to recover.—*Chan v. Slater, Sheriff*, 155.

Instructions—Evidence—Preponderance.

2. In an action of claim and delivery, the court charged that plaintiff, in order to recover, must show by a preponderance of the evidence that she was the owner of the property, and further charged that defendant sheriff was entitled to a verdict if the jury believed, "from a preponderance of all the evidence," that plaintiff's husband, under an attachment against whom the property was taken by defendant, was the owner of the property. *Held*, that the latter instruction was misleading, in the absence of any charge that defendant would be entitled to recover if the evidence did not preponderate on either side.—*Chan v. Slater, Sheriff*, 155.

Instructions—Title—"Clear" Preponderance of Evidence.

3. A charge, in an action of claim and delivery, that plaintiff must establish her title to the property by a "clear" preponderance of the evidence is technically erroneous, as a bare preponderance of the evidence would be sufficient.—*Chan v. Slater, Sheriff*, 155.

Evidence—Declarations.

4. In an action in claim and delivery, evidence of declarations made by plaintiff's husband, while apparently in exclusive possession and control of the property in controversy and under an attachment against whom the property was taken by defendant sheriff, that he was the owner of it, was admissible, as a part of the *res gestae*, to characterize the possession.—*Chan v. Slater, Sheriff*, 155.

Evidence—Declarations.

5. In claim and delivery, on the issue of whether a wife's title to property was merely colorable, and was held by her solely to shield such property from her husband's creditors, declarations of the husband, made by him while in exclusive possession and control of the property, that he was the owner thereof, were admissible, not as absolutely binding upon her, but as substantive evidence reflecting upon the *bona fides* of her claim.—*Chan v. Slater, Sheriff*, 155.

Instructions—Separate Property of Wife—Immaterial Issues.

6. Where, in an action of claim and delivery, the only issue was whether or not plaintiff's claim to the property was colorable only,

and title assumed for the purpose of protecting the same against the claims of her husband's creditors, instructions in the language of sections 220, 222, and the latter part of section 227 of the Civil Code, relative to the separate property of the wife and its liability for the husband's debts, were on an immaterial issue and should not have been given.—*Chan v. Slater, Sheriff*, 155.

Husband and Wife—Live Stock—Sales.

7. Where, in an action in claim and delivery, it was shown that plaintiff, who had independent means of her own before marriage, bought certain live stock from her husband, together with the brand owned by him; that she purchased from other parties other cattle which she branded with the brand so acquired; that her husband thereafter used another brand; that plaintiff listed the property so purchased and paid taxes thereon; that it was generally known throughout the neighborhood that the brand bought by plaintiff and the stock bearing it belonged to her, and that after the sale the husband had nothing to do with the stock except to help care for it—the evidence was sufficient to show an immediate delivery and actual and continued change of possession of the property purchased by plaintiff from her husband, so as to constitute a valid sale as against the creditors of the husband.—*Webster v. Sherman*, 448.

Crops—Ownership—Presumptions—Instructions.

8. Where, in an action in claim and delivery, it appeared that certain hay grown upon plaintiff's land had been seeded and harvested by her husband under an arrangement between them, an instruction to the effect that ownership of the land carries with it a *prima facie* presumption of ownership of the crops grown upon it correctly stated the law.—*Webster v. Sherman*, 448.

Measure of Damages—Conversion.

9. *Semble*. It would seem that the action in claim and delivery, where the property in dispute has been sold and dissipated so that it cannot be returned, is analogous to the action in conversion, and that the rule relative to the measure of damages applicable in such latter action should be applied in the absence of a code definition of the measure of damages recoverable in the former.—*Webster v. Sherman*, 448.

Damages—Detention—Interest.

10. In an action in claim and delivery, where all the evidence of value of the property seized was directed to the date of seizure and where it was not claimed that it had any usable value, the damages for detention should have been limited to interest on the amount recovered from the date of seizure to the time the verdict was returned; and to this interest plaintiff was entitled without any special finding to that effect.—*Webster v. Sherman*, 448.

Husband and Wife—Exclusive Possession—Instructions—Harmless Error.

11. An instruction, in an action in claim and delivery, where there was not any proof or offer of proof that the creditors of plaintiff's husband had been dealing with the latter on the credit of the property claimed by plaintiff, which erroneously told the jury that her property could not be taken for the husband's debts, unless it was in his sole and exclusive possession at the time it was seized by the sheriff, instead of at the time the attaching creditors dealt with him in good faith on the credit of it, could not have misled the jury, and was not reversible error.—*Webster v. Sherman*, 448.

Husband and Wife—Third Party Claims—Instructions.

12. An instruction to the effect that, in order for a wife to maintain an action in claim and delivery for property taken for the debts of her husband, it was necessary that she should have made a third party claim, and presented to the sheriff an affidavit in support thereof, was erroneous.—*Webster v. Sherman*, 448.

Conflicting Instructions—Third Party Claim—Harmless Error.

13. The giving of conflicting instructions, in an action in claim and delivery, upon the necessity of making a third party claim to the sheriff, one of which instructions correctly stated the law, while the other was erroneous but in appellant's favor, will not warrant a reversal.—*Webster v. Sherman*, 448.

Instructions—Applicability to Evidence.

14. In an action of claim and delivery, an instruction that if a married woman allows her separate property to be so mixed with that of her husband as to become indistinguishable, or acquiesces in its being so mingled, it must, as to the husband's creditors, be treated as relinquished to him, was properly refused where there was no evidence of such mingling.—*Webster v. Sherman*, 448.

Instructions—Equipoise in Evidence.

15. An instruction telling the jury, in an action in claim and delivery, that plaintiff must prove the allegations of her complaint by a preponderance of the evidence, was equivalent to saying that if there was not any preponderance in her favor, or if the evidence was evenly balanced, she could not prevail, and the refusal of the court to specially instruct that if the evidence was evenly balanced the jury should find for defendant, was not error.—*Webster v. Sherman*, 448.

Instructions.

16. A requested instruction, in an action in claim and delivery, which stated that if the jury should find the evidence for and against any material allegation of plaintiff's complaint to be evenly balanced, then plaintiff had failed to prove her case and verdict should be for defendant, was misleading, where issues were made in the pleadings as to the ownership and value of the several items of property in question. The instruction would have been proper if it had said that the verdict should be for defendant *as to the property described in that allegation*.—*Webster v. Sherman*, 448.

Value of Property—Evidence—Exclusion.

17. Where, in an action in claim and delivery, the verdict fixed the value of the property in controversy at the price put upon it by defendant sheriff in his testimony, he cannot be heard to complain of a ruling of the court excluding offered testimony tending to show the price at which it sold at sheriff's sale.—*Webster v. Sherman*, 448.

Husband and Wife—Declarations—Evidence—Creditors.

18. Testimony of statements made by the husband of plaintiff, in an action in claim and delivery, to his creditors that the property in controversy belonged to him was properly excluded, where it was not followed up by any proof or offer of proof that the attaching creditors dealt with the husband upon the credit of the property in question.—*Webster v. Sherman*, 448.

Evidence—Letters—Creditors.

19. A letter written by the husband of plaintiff, in an action in claim and delivery, to his creditors, in which he had listed the property in dispute as his, was properly excluded, where it appeared that the purpose of the writer in indicting it and of the creditors in having it written was to enable the creditors to secure a loan for the writer from another bank.—*Webster v. Sherman*, 448.

COMBINATIONS.

See Trusts.

COMMUNIS ERROR FACIT JUS.

Enabling Act—Construction.

1. *Held*, that the construction given to section 17 of the Enabling Act (relating to grants of land to the state normal school and their disposition) by the legislature of Montana, as evinced by legislative authorization of bond issues against the various land grants, has not been so uniform or made under such circumstances as to render applicable the maxim, "*Communis error facit jus*."—State ex rel. Haire v. Rice, 365.

CONSIDERATION.

See Negotiable Paper, 1; Contracts, 4.

CONSTITUTION.

Mines—Declaratory Statement—Verification—Statutes.

1. The Act of 1873 (Laws Extra. Session, 1873, p. 83) declaring that any person who shall discover any mining claim upon any vein or lode bearing gold, silver, etc., shall, within twenty days thereafter, make and file for record in the recorder's office of the county in which the discovery is made, a declaratory statement thereof in writing, on oath, describing such claim in the manner provided by the laws of the United States, etc., was not unconstitutional, as in conflict with United States Revised Statutes, section 2324 (U. S. Comp. Stats. 1901, p. 1426), which does not require the notice or declaratory statement to be verified.—Hickey et al. v. Anaconda Copper M. Co., 46.

Taxation—Trust Companies—Statutes.

2. Civil Code, section 611, providing that the property of trust deposit, and security corporations shall be assessed for purposes of taxation in the same manner as national banks, is, in view of the fact that section 5219 of the United States Revised Statutes limits the right of the state to tax such banks to the taxation of their real estate, and their stockholders to the shares of capital stock owned by them, repugnant to Article XII, sections 1 and 7 of the Constitution of Montana, in that it exempts the personal property of such companies from taxation.—Daly Bank & Trust Co. v. Board of County Commrs., 101.

Taxation—Banks and Trust Companies—Statutory Construction.

3. The purpose of section 3701, subsection 6, of the Political Code, which provides for the taxation of solvent credits, less such debts as may be owing by the taxpayer, being merely to ascertain the just amount and value of property, subject to taxation, in conformity with section 1, Article XII of the Constitution, does not have the effect of exempting from taxation property other than that enumerated in section 2 of said Article, and is therefore not unconstitutional.—Daly Bank & Trust Co. v. County Commrs., 101.

Federal—Interpretation by Federal Supreme Court—Binding upon State Courts.

4. The Constitution of the United States is, within the scope of its provisions, the supreme law of the land, and state courts and legislatures are bound by it as well as by the interpretation put upon its provisions by the federal supreme court.—State v. Cudahy Packing Co. et al., 179.

Anti-Trust Legislation.

5. Section 321 of the Penal Code, prohibiting the formation of combinations or trusts for the purpose of fixing the price or regulating the production of articles of commerce, and prescribing penalties for violations thereof, is, by reason of the provisions of section 325 of the same Code, to the effect that such prohibition shall not apply to persons engaged in agriculture and horticulture, obnoxious to that portion of the Fourteenth Amendment to the federal constitution which declares that "no state shall deny to any person within its jurisdiction the equal protection of the laws," and both sections, being dependent upon each other, are therefore void.—*State v. Cudahy Packing Co. et al.*, 179.

Sheriffs—Compensation—Mileage—Statutes.

6. Appellant was elected sheriff in November, 1904. The law then in force (Pol. Code, sec. 4604) allowed the sheriff ten cents per mile actually and necessarily traveled and ten cents per mile for each person transported to the state prison, reform school and insane asylum. In 1905, after appellant had entered upon the discharge of his duties, the legislature by Act approved March 3, 1905 (Session Laws, 1905, c. 86, p. 180), amended section 4604 so as to allow sheriffs only actual traveling expenses for such transportation. *Held*, that section 31, Article V, of the Constitution prohibiting the increasing or diminishing of a public officer's salary or emolument during his term of office, is not violated by Act of March 3, 1905, when applied to officers elected prior to its passage.—*Scharrenbroich v. Lewis & Clark County*, 250.

Normal School Lands—Bond Issues.

7. Chapter 3 of Session Laws of 1905 (page 3), authorizing the state board of land commissioners to issue and sell bonds, the proceeds to be applied to the erection, furnishing and equipment of an addition to the state normal school building, and pledging as security for the payment of the principal and interest on such bonds the lands granted by section 17 of the Enabling Act (25 Statutes at Large, 676), is void because in violation of section 12, Article XI, of the Constitution of Montana, which provides that the funds of the state institutions of learning from whatever source secured, shall be invested and only the interest from such bonds, together with the rents from leased lands belonging to the normal school grant, devoted to the maintenance of such school.—*State ex rel. Haire v. Rice*, 365.

Enabling Act—Construction—Conflict.

8. The supreme court in construing provisions of the state Constitution and of the Enabling Act, under which the former was adopted and the state admitted into the Union, will, in response to a contention that where the Constitution is in conflict with the Enabling Act the former must yield, reconcile, if possible, the provisions of both instruments, since courts will with the greatest hesitation hold inoperative and invalid a provision of the state Constitution.—*State ex rel. Haire v. Rice*, 365.

State Normal School Lands—Enabling Act.

9. *Held*, that section 17 of the Enabling Act (25 Statutes at Large, 676), which grants certain lands to the State of Montana for the state normal school and provides for the manner in which such lands shall be held and disposed of and the funds derived therefrom applied, and section 12 of Article XI of the Constitution of the state, under which the legislature may prescribe the manner in which the funds shall be loaned, are not in conflict.—*State ex rel. Haire v. Rice*, 365.

Contemporaneous Construction.

10. The doctrine of contemporaneous construction only becomes effective when there is a reasonable doubt as to the meaning of the provision to be construed, and acquiescence for no length of time in a construction by co-ordinate branches of the government, which has the effect of nullifying a provision of the Constitution, will justify the courts in adopting such construction unless it is the only reasonable one.—State ex rel. Haire v. Rice, 365.

Election Contests—Citizenship.

11. The fourteenth amendment to the Constitution of the United States declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof" are citizens, is not exclusive as a definition of citizenship, but declaratory of the rights existing under the law at the time of its adoption and as affirmative of them, and has no application to acquisition of citizenship by birth in foreign lands of parents who were American citizens.—Buckley v. McDonald, 483.

Criminal Law—Instructions—Jury Trial.

12. Where defendant in a prosecution for murder pleads "not guilty," an instruction to the jury to the effect that they could find him guilty of murder in either of its degrees, or of voluntary or involuntary manslaughter, but "you cannot find him not guilty," is in contravention of defendant's constitutional right (Constitution, Article III, section 16) to have the question of his guilt or innocence determined by a jury, of which right he cannot be deprived no matter how clear and unimpeached or free from suspicion the evidence may be.—State v. Koch, 490.

Criminal Law—Jury Trial.

13. *Obiter.* The constitutional guaranty that in all criminal prosecutions the accused shall have the right to a trial by jury (Constitution, Article III, section 16) includes misdemeanors as well as felonies.—State v. Koch, 490.

Criminal Law—Trial—What Constitutes.

14. The word "trial" as used in Section 16, Article III, of the Constitution, embraces all proceedings in the progress of a criminal prosecution after the issues are made up, down to and including the rendition of the verdict.—State v. Koch, 490.

Taxation of Costs—Notice—Due Process of Law.

15. *Semble.* A statute which authorizes the taxation of costs upon the filing of a memorandum, without notice to the person liable therefor, would seem to be obnoxious to the constitutional guaranty that no person shall be deprived of life, liberty or property without due process of law (Constitution, Article III, section 27), the phrase "due process of law," including notice and a hearing before judgment.—State ex rel. Riddell v. District Court et al, 529.

CONSTITUTION OF MONTANA.**(Sections Cited or Commented upon.)**

Article III, section 10.....	501
Article III, section 16.....	495
Article III, section 18.....	509
Article III, section 23.....	496
Article III, section 27.....	385, 532
Article III, section 29.....	496
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Article VIII, section 12.....	155
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Article XII, section 1.....	105, 108
Article XII, section 2.....	106, 107
Article XII, section 7.....	105
Article XII, section 17.....	106
Article XV, section 20.....	183

CONTEMPT.

Water Commissioners—Ministerial Officers.

1. The Act of 1905, relative to the appointment of commissioners to measure and divide water among persons declared by decree of court to be entitled thereto, and empowering such commissioners to arrest any person interfering with the distribution made by them (Session Laws, 1905, p. 144), does not constitute them judicial officers, in the sense that violations of their orders are contempts committed in the immediate view and presence of the court.—State ex rel. Flynn v. District Court et al., 115.

Certiorari—Written Charges—District Court—Jurisdiction.

2. *Certiorari* lies to annul an order of the district court punishing relator for contempt, alleged to have been committed in interfering with the distribution of water by a commissioner appointed in pursuance of the Act of 1905 (Session Laws, 1905, p. 144), where written charges were not filed by such commissioner, setting forth in direct language the facts constituting the contempt.—State ex rel. Flynn v. District Court et al., 115.

District Judges—Disqualification—Bias and Prejudice—Motion for New Trial.

3. The affidavit imputing bias and prejudice on the part of the district judge, provided for in section 180 of the Code of Civil Procedure, as amended by Act of 1903 (Laws of 1903, 2d Extra. Session, p. 9), may be filed by attorney or client, after a trial has been had and while a motion for a new trial is pending, at any time before the day set for the hearing of such motion; and the filing thereof does not constitute contempt.—State ex rel. Carleton v. District Court et al., 138.

Certiorari—Timely Application.

4. After an order, adjudging one guilty of contempt and imposing punishment, has been made and entered—the district judge thus finally disposing of the matter—an application to the supreme court for a writ of review is not premature, although execution of the order had been suspended to a day certain to allow relator to attend to business of importance.—State ex rel. Carleton v. District Court et al., 138.

Interference with Judicial Proceedings—Resisting Officer.

5. Resistance of, or interference with, an officer while endeavoring to take property into his possession, pursuant to the provisions of Code of Civil Procedure, section 843, in an action in claim and delivery, is an interference with the proceedings of the court in the cause, and constitutes a contempt within the meaning of Code of Civil Procedure, section 2170, subdivision 9.—State ex rel. Bruce v. District Court et al., 359.

Jurisdiction—Refusal to Receive Summons.

6. The district court may punish a defendant in an action in claim and delivery, for contempt (Code of Civil Procedure, section 2170), not-

withstanding technically it had not acquired jurisdiction over him, by reason of the fact that he had refused to receive a copy of the summons, or other papers which authorized the officer to take the property in controversy into his possession, where it appeared that he knew the mission of the officer and openly announced his intention to prevent the officer from doing his duty in the premises.—*State ex rel. Bruce v. District Court et al.*, 359.

Order to Show Cause—Sufficiency.

7. Where defendant, in an action in claim and delivery, appeared in court in obedience to an order to show cause why he should not be punished for contempt, and where the affidavit served with the order stated a contempt, the defendant may not be heard to complain that the judgment of conviction is void, in that the order required him to show cause for an unlawful interference with the *process* of the court, whereas he was convicted of an unlawful interference with its *proceedings*.—*State ex rel. Bruce v. District Court et al.*, 359.

CONTINUANCE.

See District Courts, 7.

CONTRACTS.

See, also, Negotiable Paper, 1; Sales.

Construction—Supply of Water Power.

1. A contract bound plaintiff to deliver to defendant power as follows: "For the first five years, 5,000 horse-powers free of charge; for the second five years, 5,000 horse-powers at the annual rate of \$2.50 per horse-power; and thenceforth 5,000 horse-powers at the annual rate of \$5.00 per horse-power, or so much thereof as [defendant] shall consume. It is understood that if [defendant] desires further power, and the same is not being used [plaintiff] will furnish it for the first ten years at the annual rate of \$2.50 per horse-power, and thereafter at the annual rate of \$5.00 per horse-power." *Held*, that the "first ten years" used in the stipulation for extra power ran concurrently with the five-year periods for which the power rate was fixed; and their commencement was not postponed until defendant should commence using extra power, but at the expiration of ten years from the date when power was first furnished under the contract defendant was bound to pay the \$5 rate for all power used by it, whether in excess of 5,000 horse-powers or not.—*Great Falls W. P. & T. Co. v. Boston & Mont. C. C. & S. M. Co.*, 10.

Real Estate—Brokers—Statute of Frauds.

2. Where it did not appear that a broker's contract of employment to sell real estate was in writing, or that any note or memorandum thereof, signed by the party to be charged, had been executed as required by Civil Code, section 2185, subdivision 6, no recovery could be had for services rendered thereon.—*Marshall v. Trerise et al.*, 28.

Evidence—Counterclaims.

3. Evidence, introduced by defendant to prove a counterclaim for services as a real estate agent, no testimony having been offered by plaintiff in opposition thereto, *held* to be insufficient to prove a contract upon which the counterclaim—even upon an erroneous theory of the court as to the law applicable—could be supported.—*Marshall v. Trerise et al.*, 28.

Consideration—Forbearance to Sue.

4. *Obiter*. Forbearance to sue a third person constitutes a valid consideration for a contract.—*Bank of Ontario v. Hoskins et al.*, 306.

Claims Against Estates—Founded on Written Instruments.

5. A claim against an estate is not "founded on a bond, bill, note or other instrument," within the meaning of Code of Civil Procedure, section 2607, where it appears to be due upon an oral agreement, the result of which is an account stated.—*Dorais v. Doll et al.*, 314.

Indians—Intoxicating Liquors—Evidence.

6. Where recovery was had on a contract other than for intoxicating liquors sold to defendant, the district court properly excluded evidence and refused instructions relative to defendant's status as an Indian maintaining tribal relations.—*Kalispell L. & T. Co. v. McGovern et al.*, 394.

Cattle—Delivery—Evidence.

7. The district court, in an action brought to recover damages for the breach of a contract which called for the delivery of certain beef cattle, did not commit error in not admitting evidence to show that it was the intention of the parties that the delivery of the cattle should be made at the ranch of defendant, where it was apparent that the contract was so construed by the court, as evidenced by the instructions submitted, as well as by the plaintiff, who had sent agents to defendant's ranch to demand delivery there.—*Great Falls Meat Co. v. Jenkins*, 417.

CONTRIBUTORY NEGLIGENCE.

See Personal Injuries.

CONVERSION.**Partnership—Sale of Entire Stock by One Partner—Measure of Damages—Evidence.**

1. The measure of damages applicable in an action brought by a partner to recover the value of his interest in the partnership property sold to a stranger by his copartner in violation of Civil Code, section 3232, subsection 3, is that fixed by Civil Code, section 4333, as the reasonable value of the property at the date of the conversion, or the highest market value at any time between the conversion and the verdict; and evidence, offered to show the accounts between the partners and that the firm was in debt, was neither relevant nor material as tending to establish the value of the property sold.—*Doll v. Hennessy Mercantile Co.*, 80.

Pledges—Accounting—Election—Waiver of Tort.

2. Where a pledgor demanded an accounting by the pledgee, not only of the proceeds derived from the use of the property pledged, but also for the price realized from a wrongful sale thereof, and thereafter sued to recover such sums, he thereby waived the pledgee's tort in converting the property.—*Demars v. Hudon*, 170.

Pledges—Extent of Liability of Pledgee.

3. Where a pledgee converted the property pledged by selling the same on credit for \$2,500, without interest, taking the purchaser's secured note, which he surrendered on payment of \$2,050, the pledgor, on waiving the tort, was entitled to recover the full sale price, and was not limited to the amount which the pledgee had actually received from the purchaser.—*Demars v. Hudon*, 170.

Pledges—Accounting—Interest.

4. Where a pledgee of certain property sold the same on credit, without interest, the pledgor, on ratifying the sale and suing the pledgee for an accounting, was chargeable with interest on the loan secured by the pledge at the agreed rate to the date at which defendant received payment for the property sold sufficient to discharge the indebtedness, and not merely to the date of the sale.—*Demars v. Hudon*, 170.

Public Administrators—Mingling of Funds of Estates.

5. The mingling of all funds, received by a public administrator from the different estates in his charge, in one general deposit in a bank, in face of the provision of section 4521 of the Political Code, requiring him to deposit such moneys with the county treasurer, who is required to keep a separate account with each estate, constitutes conversion.—*Baban v. Cascade Bank*, 413.

COSTS.

Appeal—Briefs—Failure to File—Effect.

1. Where on the day set for hearing an appeal in the supreme court, appellant's brief is not on file and his counsel fails to appear to be heard, the judgment of the district court will be affirmed at the cost of appellant.—*Henningsen et al. v. Thomas*, 538; *In re Davis' Estate*, 539.

Appeal—Necessary Disbursements—What Constitutes.

2. Disbursements necessarily made to secure the review of a case are a part of the costs necessarily incurred.—*Montana Ore Pur. Co. v. Boston & Mont. C. C. & S. M. Co.*, 400.

What Items Recoverable.

3. Only such items of disbursements may be recovered by the successful party as are provided by section 1866 of the Code of Civil Procedure.—*Montana Ore Pur. Co. v. Boston & Mont. C. C. & S. M. Co.*, 400.

Bills of Exceptions—Stenographer's Copies.

4. The cost of copies of stenographers' notes of the testimony, used in the preparation of bills of exceptions, is a proper item of disbursements under section 1866 of the Code of Civil Procedure, which the successful party may recover, even though such copies were procured from day to day during the progress of the trial and prior to a final decision.—*Montana Ore Pur. Co. v. Boston & Mont. C. C. & S. M. Co.*, 400.

Stenographers—Verbatim Copies—Excessive Charges.

5. A charge of ten cents per folio, in a memorandum of costs, for verbatim copies of the testimony incorporated in a bill of exceptions, as permitted by the Rules of the Supreme Court (Rule VII, 30 Mont. xxiv, 82 Pac. ix, is excessive, the legal fee, under Code of Civil Procedure, section 373, being five cents per folio.—*Montana Ore Pur. Co. v. Boston & Mont. C. C. & S. M. Co.*, 400.

Transcripts—Excessive Charges.

6. Where the principal part of a transcript, consisting of 15,010 folios, was made up of copies of evidence obtained from the stenographer, chargeable at five cents per folio (Code of Civil Procedure, section 373), and but a small portion prepared by the clerk of the district court, for which ten cents per folio is the proper charge (Political Code, section 4636), a charge of ten cents per folio for the

whole number of folios contained in the transcript was excessive.—*Montana Ore Pur. Co. v. Boston & Mont. C. C. & S. M. Co.*, 400.

District Courts—Appeal—Briefs.

7. District courts do not possess the power, on a motion to tax the costs of an appeal, to disallow an item for supplemental briefs used in the appellate court, the question of the necessity of such briefs being one for the supreme court to decide.—*Montana Ore Pur. Co. v. Boston & Mont. C. C. & S. M. Co.*, 400.

District Courts—Appeal—Transcript.

8. District courts have no power to say, on a motion to tax the costs of an appeal, that any portion of the transcript on appeal should have been omitted as unnecessary, the supreme court being the exclusive judge of what the record on appeal shall contain in order to present appellant's case to it for review.—*Montana Ore Pur. Co. v. Boston & Mont. C. C. & S. M. Co.*, 400.

Appeal—Transcript—Printing by Contract—Cuts—Improper Charge.

9. The district court, on a motion to tax the costs of an appeal, properly struck out an item charged for cuts used in the printed transcript and made expressly for that purpose, where the printing was done by contract at a certain rate per page, since the contract price only was properly chargeable.—*Montana Ore Pur. Co. v. Boston & Mont. C. C. & S. M. Co.*, 400.

Appeal—Remittitur—Supreme Court Opinion—Copy.

10. Where a judgment or order of the trial court is reversed or modified, a copy of the opinion of the supreme court must accompany the *remittitur* (Rule XIX of the Supreme Court, 30 Mont. xlii, and it was error for the district court, on a motion to tax the costs of an appeal, to disallow an item charged for a copy of such opinion.—*Montana Ore Pur. Co. v. Boston & Mont. C. C. & S. M. Co.*, 400.

Witnesses—Mileage.

11. While witnesses residing in a county other than where the trial is had, and more than thirty miles from the place where it takes place, may not be compelled to attend, under Code of Civil Procedure, section 3304, still, where they do attend and the court finds that their testimony was necessary, the successful party is entitled to include the amount paid them for mileage in his cost bill. [Mr. Justice Hollo-way dissenting.]—*Great Falls Meat Co. v. Jenkins*, 417.

Attachment—Motion to Dissolve—Appealable Orders.

12. Plaintiff, in an action for damages for breach of a contract to deliver certain beef cattle, caused an attachment to issue and to be levied upon some of the cattle. Defendant moved to dissolve the attachment, which motion was overruled. Defendant did not appeal from this order. *Held*, that owing to his failure to appeal from the order refusing to dissolve the attachment—an appealable order—(Session Laws, 1899, page, 146), defendant cannot be heard to complain, on appeal from the judgment, of that part of it which reimbursed plaintiff for the reasonable and necessary expense incurred by him in caring for the property.—*Great Falls Meat Co. v. Jenkins*, 417.

Notice—Constitution—Due Process of Law.

13. *Semble*. A statute which authorizes the taxation of costs upon the filing of a memorandum, without notice to the person liable therefor, would seem to be obnoxious to the constitutional guaranty that no person shall be deprived of life, liberty or property without due process of law (Constitution, Article III, section 27), the phrase "due process of law" including notice and a hearing before judgment. *State ex rel Riddell v. District Court et al.*, 529.

Service of Memorandum—Statutes.

14. *Held*, that the provisions of section 1867 of the Code of Civil Procedure with reference to service upon the adverse party of memorandum of the items of cost and disbursements claimed by the party in whose favor judgment is rendered, are applicable to proceedings under section 1869 of the same Code, relative to costs awarded by an appellate court.—*State ex rel. Riddell v. District Court et al.*, 529.

Collection—Mode to be Pursued.

15. The recovery of costs as such is regulated by statute, and the method therein pointed out for their collection must be pursued.—*State ex rel. Riddell v. District Court et al.*, 529.

Notice—Waiver—Jurisdiction—*Certiorari*.

16. Where a party, against whom costs awarded on appeal were sought to be recovered under section 1869 of the Code of Civil Procedure, had not been served with a memorandum of such costs, his special appearance, for the purpose of submitting a motion to strike out the memorandum as a whole and also a motion to tax the cost-bill on its merits, did not give the court jurisdiction to tax the costs, and *certiorari* lies to annul such order.—*State ex rel. Riddell v. District Court et al.*, 529.

COUNTERCLAIMS.**Real Estate—Sale—Agents—Conflicting Instructions.**

1. In an action on a promissory note for \$700, where a counterclaim was interposed setting up that plaintiff was indebted to defendants in the sum of \$1,000 for services performed by one of them as real estate agent, instructions examined and *held* not to be conflicting.—*Marshall v. Trerise et al.*, 28.

Evidence—Contracts.

2. Evidence, introduced by defendant to prove a counterclaim for services as a real estate agent, no testimony having been offered by plaintiff in opposition thereto, *held* to be insufficient to prove a contract upon which the counterclaim—even upon an erroneous theory of the court as to the law applicable—could be supported.—*Marshall v. Trerise et al.*, 28.

COUNTY ATTORNEYS.**Criminal Law—Justices' Courts—Appeals—Notice.**

1. Failure to serve notice upon the county attorney of an appeal to the district court from a judgment of conviction had in a justice's court is not ground for the dismissal of the appeal.—*State ex rel. Hodgdon v. District Court*, 119.

CRIMINAL LAW.**Justices' Courts—Appeals—Notice—County Attorneys.**

1. Failure to serve notice upon the county attorney of an appeal to the district court from a judgment of conviction had in a justice's court is not ground for the dismissal of the appeal.—*State ex rel. Hodgdon v. District Court*, 119.

Justices' Court—Judgments for Fine.

2. A judgment rendered by a justice of the peace, in a case of misdemeanor, imposing a fine, with imprisonment in the county jail until the fine be paid, is not a judgment for fine only, within

the meaning of section 2714 of the Penal Code.—State ex rel. Hodgdon v. District Court, 119.

Justices' Courts—Appeals—Undertaking—Necessity.

3. An undertaking on appeal from a judgment of conviction for a misdemeanor, rendered by a justice of the peace, imposing a fine and remanding defendant to the county jail until such fine be paid, is not necessary to confer jurisdiction on the district court to entertain the appeal.—State ex rel. Hodgdon v. District Court, 119.

Prosecuting Witness—Variance in Name—Idem Sonans.

4. Defendant was convicted of the crime of robbery. The information stated the name of the injured person as "Frank Rex" whereas his own testimony showed that it was "Frank Röck." There was not any showing that he was named, or had been known as, Frank Rex. *Held*, that, the names being unlike in sound or spelling, and the information having failed to disclose any description which made it at all certain that "John Rex" and "John Röck" were one and the same person, the variance was fatal to conviction.—State v. Lee, 203.

Grand Larceny—Evidence—Sufficiency.

5. In a prosecution for grand larceny, of which defendant was charged jointly with two others, evidence which showed knowledge on the part of the defendant and his associates of the prosecuting witness' possession of the property taken; their destitute condition at, and for some time prior to, the date of the crime; an opportunity to commit the theft; the defendant's intimacy with his associates; the fact that one of them had pawned a watch stolen from the prosecuting witness and that defendant furnished the money to redeem it; the deposit by the defendant of bills the same in number and denomination as those stolen; and his inability to explain satisfactorily how he came by them, *held*, sufficient to establish the larceny, and to go to the jury upon the question whether or not defendant was connected with it as an aider or abettor.—State v. Wells, 291.

Grand Larceny—Evidence—Declarations.

6. While, after the purpose of a conspiracy has been accomplished, evidence of acts or declarations of defendant's associates, as against the defendant, is hearsay, yet where, in a prosecution for grand larceny, information was elicited by the prosecuting witness from one of the associates of defendant, as to the whereabouts of one of the articles stolen, without being told how it came to be at the place indicated, evidence of such information was properly admitted as relevant to the inquiry whether in fact a larceny had been committed.—State v. Wells, 291.

Criminal Law—Evidence—Harmless Error.

7. Where, in a prosecution for grand larceny, the principal fact—the larceny—had been established, and the inquiry was as to the defendant's guilty connection with the theft, the admission in evidence of statements made to the prosecuting witness by one of the defendant's associates in the crime, as to the whereabouts of one of the articles stolen, if error, was error without prejudice, since the evidence in nowise incriminated the defendant.—State v. Wells, 291.

Grand Larceny—Evidence—Cross-examination—Impeaching Witness.

8. The complaining witness in a prosecution for grand larceny was examined before a committing magistrate, his testimony reduced to writing, and signed by him. His statements at the trial showed a discrepancy between his testimony formerly given and the facts then sworn to as to certain particulars. The question was thereupon asked

him on cross-examination whether his testimony at the preliminary examination was true or false. *Held*, that the answer to this question was properly excluded, since the purpose of the statute (Code of Civil Procedure, sections 3379, 3380) had been served by calling the discrepancy to the attention of the jury, who were the judges of the credibility of the witness.—State v. Wells, 291.

Grand Larceny—Accomplices—Instructions.

9. Defendant in a prosecution for grand larceny may not complain on appeal that an instruction, to the effect that the question whether he was an accomplice with his associates in the crime, or either of them, was solely for the jury to determine, had not been given in the exact form requested by him, if one in substance to that effect was submitted.—State v. Wells, 291.

Disbarment—Supreme Court—Jurisdiction—Crimes and Misdemeanors.

10. The supreme court has exclusive jurisdiction in a disbarment proceeding to hear the evidence and determine the truth of charges of crimes and misdemeanors involving moral turpitude, whether committed within this jurisdiction or not, and whether within or without the sphere of official duty.—In re Thresher, 441.

Disbarment—Crimes Falling Without Sphere of Official Duty—Supreme Court—Jurisdiction.

11. Where the crime charged against an attorney, in a disbarment proceeding, falls clearly without the sphere of official duty, it is discretionary with the supreme court to hear and determine it upon the merits prior to a criminal prosecution and conviction in the proper court.—In re Thresher, 441.

Disbarment—District Courts—Criminal Proceedings.

12. Where the conduct charged as ground for the disbarment of an attorney falls within the sphere of official duty, the supreme court will hear and determine the matter, regardless of the fact that it amounts to an offense against the criminal laws of the state, and will not wait to inquire whether criminal proceedings have been instituted and prosecuted to a conclusion.—In re Thresher, 441.

Instructions—Jury Trial—Constitution.

13. Where defendant in a prosecution for murder pleads "not guilty," an instruction to the jury to the effect that they could find him guilty of murder in either of its degrees, or of voluntary or involuntary manslaughter, but "you cannot find him not guilty," is in contravention of defendant's constitutional right (Constitution, Article III, section 16) to have the question of his guilt or innocence determined by a jury, of which right he cannot be deprived no matter how clear and unimpeached or free from suspicion the evidence may be.—State v. Koch, 490.

Jury Trial.

14. *Obiter*: The constitutional guaranty that in all criminal prosecutions the accused shall have the right to a trial by jury (Constitution, Article III, section 16) includes misdemeanors as well as felonies.—State v. Koch, 490.

Trial—What Constitutes.

15. The word "trial" as used in Section 16, Article III, of the Constitution, embraces all proceedings in the progress of a criminal prosecution after the issues are made up, down to and including the rendition of the verdict.—State v. Koch, 490.

Manslaughter—Trial Jury—Disagreement—Discharge—Once in Jeopardy.

16. Defendant, charged with murder, was tried three times, and at the third trial found guilty of manslaughter. The jury disagreed upon the second trial, and was discharged. At the third trial the plea of once in jeopardy was interposed on the ground that the jury had been discharged at the second trial without there having existed a necessity therefor. The district court overruled this defense. *Held*, that the disagreement of a jury and their consequent discharge do not operate to bring the defendant within the provision of the Constitution (Article III, Section 18) that no person shall be twice put in jeopardy for the same offense.—*State v. Keerl*, 501.

Jury—Disagreement—Once in Jeopardy.

17. Where a person charged with crime, after a trial, is neither convicted nor acquitted, but owing to a mistrial the jury is discharged and the trial ended, he may again be put upon trial for the same offense, and the defense of once in jeopardy will not lie.—*State v. Keerl*, 501.

District Courts—Mistrial—Minutes.

18. In a prosecution for murder, where the jury was discharged at the end of a mistrial, because there was "a reasonable probability that the jury cannot agree," an entry in the minutes in those words was in accordance with the provisions of the Penal Code, section 2125, and sufficient.—*State v. Keerl*, 501.

Acquittal—What may Constitute.

19. *Obiter*: Where the defendant in a criminal prosecution has been arraigned and the trial has been begun upon a valid indictment or information, and he is discharged by a competent court before verdict, an acquittal results, and the plea of once in jeopardy will lie. (Penal Code, section 2126). (On Motion for Rehearing.)—*State v. Keerl*, 501.

Jeopardy.

20. In a given criminal prosecution there is only one jeopardy which continues in case of a discharge of the jury for disagreement, as also where a new trial is granted, from the beginning of the trial, after the swearing in of the first jury, until the particular same case is finally determined.—*State v. Keerl*, 501.

Judgment of Acquittal or Conviction—Jeopardy.

21. After a verdict on a judgment of conviction or acquittal, the defendant in a criminal case has been in jeopardy and may not be tried again for the same offense, except where a new trial has been granted or ordered.—*State v. Keerl*, 501.

Plea of "Once in Jeopardy"—What It Includes.

22. The plea of "once in jeopardy" includes the plea of former conviction or acquittal and a judgment of conviction or acquittal.—*State v. Keerl*, 501.

CROPS.

See Claim and Delivery, 8.

DAMAGES.

See, also, Personal Injuries; Excessive Damages; Claim and Delivery; Partnership, 5-11; Conversion.

DECEIT.

See, also, Attorneys, 5, 13.

Justice of the Peace—Jurisdiction.

1. Section 66 of the Code of Civil Procedure, enacted in pursuance of sections 21 and 22 of Article VIII, of the Constitution, does not clothe justices of the peace, either expressly or impliedly, with power to try and determine actions for deceit.—State ex rel. Mathews v. Taylor, 212.

DECLARATIONS.

Self-serving—Forcible Entry.

1. In an action for forcible entry, evidence in behalf of plaintiff, that before the act complained of, plaintiff stated that he claimed one hundred and sixty acres, pointed out to witness the land he desired to take, and that the land pointed out was that in dispute, was incompetent, the statements so made to witness having been self-serving declarations.—Spellman v. Rhode, 21.

Claim and Delivery—*Res Gestae*.

2. In an action in claim and delivery, evidence of declarations made by plaintiff's husband, while apparently in exclusive possession and control of the property in controversy and under an attachment against whom the property was taken by defendant sheriff, that he was the owner of it, was admissible, as a part of the *res gestae*, to characterize the possession.—Chan v. Slater, Sheriff, 155.

Claim and Delivery.

3. In claim and delivery, on the issue of whether a wife's title to property was merely colorable, and was held by her solely to shield such property from her husband's creditors, declarations of the husband, made by him while in exclusive possession and control of the property, that he was the owner thereof, were admissible, not as absolutely binding upon her, but as substantive evidence reflecting upon the *bona fides* of her claim.—Chan v. Slater, Sheriff, 155.

DISBARMENT.

See Attorneys, 3, 4, 5.

DISCRETION.

See District Court, 7.

DISTRICT COURTS.

Certiorari—Contempt—Written Charges—Jurisdiction.

1. *Certiorari* lies to annul an order of the district court punishing relator for contempt, alleged to have been committed in interfering with the distribution of water by a commissioner appointed in pursuance of the Act of 1905 (Session Laws, 1905, p. 144), where written charges were not filed by such commissioner, setting forth in direct language the facts constituting the contempt.—State ex rel. Flynn v. District Court et al., 115.

Judges—Disqualification—Bias and Prejudice—Motion for New Trial—Contempt.

2. The affidavit imputing bias and prejudice on the part of the district judge, provided for in section 180 of the Code of Civil Procedure, as amended by Act of 1903 (Laws of 1903, 2d Extra. Session, p. 9), may be filed by attorney or client, after a trial has been had and while a motion for a new trial is pending, at any time before the day

set for the hearing of such motion; and the filing thereof does not constitute contempt.—*State ex rel. Carleton v. District Court et al.*, 138.

Probate Jurisdiction—Powers.

3. The district court, sitting as a court of probate, has only such powers as are expressly conferred upon it by statute, and such as are necessarily implied in order to carry out those expressly conferred. In *re Tuohy's Estate*, 230.

Probate Jurisdiction—Real Estate—Order of Sale—Title.

4. The district court when sitting in probate, on an application for an order of sale of real estate made under section 2671 of the Code of Civil Procedure, may not enter into an investigation of questions of title to property included in the order and alleged by objectors to the granting of such order to have been devised for a valuable consideration, and for that reason exempt from sale until after the disposition of all the other property belonging to the estate.—In *re Tuohy's Estate*, 230.

Probate Proceedings—Real Estate—Order of Sale—Laches.

5. *Quære*: May district courts, when sitting in probate, deny an order for the sale of real estate, where it appears that there has been such unreasonable delay in making the application as to amount to laches?—In *re Tuohy's Estate*, 230.

Equity—Jury Trial—Directing Verdict.

6. Where the cause of action stated in the complaint is one of purely equitable cognizance, and no issue is presented which would entitle either of the parties to a jury trial, the court may direct the jury in attendance to return a verdict, even though the evidence be conflicting.—*Short v. Estey et al.*, 261.

Amendments—Continuance—Discretion—Appeal.

7. Under Code of Civil Procedure, section 774, it was within the court's discretion to permit an amendment to a complaint after the cause had been called for trial, and deny a motion for postponement, where it did not appear that movant was surprised by the presentation of an issue which he was not prepared to meet, or that he did not meet it with all the evidence available in any event; and, on appeal in the absence of an affirmative showing of prejudice, the assignment of error in this respect will be held without merit.—*Dorais v. Doll et al.*, 314.

Costs—Appeal—Briefs.

8. Districts courts do not possess the power, on a motion to tax the costs of an appeal, to disallow an item for supplemental briefs used in the appellate court, the question of the necessity of such briefs being one for the supreme court to decide.—*Montana Ore Pur. Co. v. Boston & Mont. C. C. & S. M. Co.*, 400.

Appeal—Costs—Transcript.

9. District courts have no power to say, on a motion to tax the costs of an appeal, that any portion of the transcript on appeal should have been omitted as unnecessary, the supreme court being the exclusive judge of what the record on appeal shall contain in order to present appellant's case to it for review.—*Montana Ore Pur. Co. v. Boston & Mon. C. C. & S. M. Co.*, 400.

New Trial—Statement—Preparation and Service.

10. Where, by stipulation of counsel, the time for the preparation and service of a statement on motion for a new trial had been extended for ninety days, the district court had power to grant a further extension, without the consent of the adverse party and upon good

cause shown, within the limit of ninety days prescribed by Code of Civil Procedure, section 1897, as amended by Session Laws, 1903, page 38, and service made during the time so granted by the court was timely.—*Nord v. Boston & Mont. C. C. & S. M. Co.*, 464.

Criminal Law—Disagreement of Jury—Minutes.

11. In a prosecution for murder, where the jury was discharged at the end of a mistrial, because there was "a reasonable probability that the jury cannot agree," an entry in the minutes in those words was in accordance with the provisions of the Penal Code, section 2125, and sufficient.—*State v. Keerl*, 501.

Trial—Exclusion of Evidence—Appeal.

12. If the trial court's ruling upon the exclusion of evidence is correct, the reason upon which it is founded is immaterial.—*Brown et al. v. Daly*, 523.

DIVORCE.

Extreme Cruelty—Complaint—Proof.

1. Under Civil Code, section 134, grievous bodily injury or bodily injury dangerous to life are ultimate facts which must be pleaded and proved in order to entitle plaintiff to a divorce on the ground of extreme cruelty.—*Ryan v. Ryan*, 406.

Extreme Cruelty—Complaint.

2. A complaint in an action for divorce upon the ground of extreme cruelty, in that defendant struck, beat and choked plaintiff and otherwise brutally treated her, but which omitted to allege that the acts of defendant produced grievous bodily injury or bodily injury dangerous to life (Civil Code, section 134), failed to state a cause of action. [Mr. Justice Milburn, dissenting].—*Ryan v. Ryan*, 406.

Alimony—Complaint.

3. In order to entitle plaintiff, in an action for divorce, to alimony, the complaint should set forth her necessity therefor and defendant's ability to pay it.—*Ryan v. Ryan*, 406.

Attorneys—Alimony—Counsel Fees—Unprofessional Conduct.

4. The conduct of an attorney who entered into a contract with his client, in a divorce proceeding, whereby he was to receive, in addition to the attorney's fee that might be allowed him by the court, a portion of all the moneys received by the client as alimony, and who failed to call such agreement to the court's attention, prior to the making of the order allowing counsel fees, is reprehensible, and in violation of his duty as a member of the bar.—*In re Carleton*, 431.

DOCTRINE OF RELATION.

See *Relation*.

DUE PROCESS OF LAW.

See *Constitution*; *Costs*, 13.

EJECTMENT.

See *Justices of the Peace*, 5.

ELECTION.

Pledges—Accounting—Conversion—Waiver of Tort.

1. Where a pledgor demanded an accounting by the pledgee, not only of the proceeds derived from the use of the property pledged,

but also for the price realized from a wrongful sale thereof, and thereafter sued to recover such sums, he thereby waived the pledgee's tort in converting the property.—*Demars v. Hudon*, 170.

ELECTIONS.

Contests—Appeal—Exhibits—Marked Ballots.

1. *Held*, on appeal from a judgment in an election contest, that ballots, alleged to have been used on the trial and brought to the supreme court in a box to which was attached a memorandum of the trial judge to the effect that he had received the box from the clerk of the district court, had never opened it, but believed that it contained the original ballots, may not be looked to for the purpose of ascertaining whether any of said ballots bear distinguishing marks, because not identified as the original ballots in their original form as introduced in evidence in the court below, and because of the absence of a certificate of the judge to that effect. (Rule VIII, Subd. 1., Rules of Supreme Court.)—*Pledge v. Griffith*, 191; *Pledge v. Tweedie*, 197.

Contests—Counting of Illegal Votes—When Harmless Error.

2. The votes cast for respondent in an election contest, in the county numbered 619; of these 37 were cast at a precinct located on an Indian reservation. The total vote of his opponent was 539, of which 12 were cast at said precinct. *Held*, that the reception of the ballots cast at said precinct, and alleged to be illegal, did not prejudice the rights of the unsuccessful candidate, nor those of the elector who instituted the contest proceedings, since, after deduction of the votes cast at that precinct for each candidate, from the total vote received by each in the county, the result of the election would not be affected.—*Pledge v. Griffith*, 191, *Pledge v. Tweedie*, 197.

Contests—Pleadings—Grounds of Contest—Waiver.

3. Section 2010, Code of Civil Procedure, enumerates, among others, "malconduct on the part of the board of judges," and the reception of "illegal votes," as grounds for which any elector of a county may contest the right of one to hold an office therein to which he has been declared elected. Contestant in his statement of contest alleged misconduct on the part of the judges, in that they received and counted for respondent votes claimed to have been illegally cast at a precinct on an Indian reservation. *Held*, that each of the causes enumerated in section 2010 constitutes a separate cause of contest, each independent of the other, and that, while contestant may join grounds of contest embracing the several causes mentioned, if he does not do so, but elects to proceed upon one particular ground, he must be deemed to have waived any other ground enumerated.—*Coleman v. Kerr*, 198.

Contests—Reception of Illegal Votes—Not Malconduct of Judges.

4. The reception of illegal votes does not constitute "malconduct on the part of the board of judges," within the meaning of section 2010, Code of Civil Procedure, since, under the provisions of the same section, a contest may also be instituted "on account of illegal votes," the legislature thus clearly indicating that it desired to draw a distinction between these two grounds of contest. [*Mr. Justice Milburn dissenting.*]—*Coleman v. Kerr*, 198.

Contests—Citizenship—Burden of Proof.

5. In an election contest the burden rests upon the party challenging the eligibility of a person to an office on the ground that he is an

alien, to prove the fact of his alienage by a preponderance of the evidence; and where the district court, while not making a formal finding in that regard, in a written opinion stated, "if the fact of the nativity of contestee can be definitely found from the evidence," it was apparent that the contestant had failed to sustain this burden and the judgment should have been against his contention.—*Buckley v. McDonald*, 483.

Contests—Citizenship—Presumptions.

6. The presumption will be indulged that the father of contestee in an election contest in which the nativity of the latter was at issue, was a citizen of the United States, where it was found that the former at the time of contestee's birth resided in a city within this country.—*Buckley v. McDonald*, 483.

Contests—Citizenship—United States Merchant Marine Service—Presumptions.

7. Where, in an election contest in which the contestee's citizenship at the time of his election was in question, it was found that his father had been a captain in the merchant marine service of the United States, it must be presumed that the latter was a citizen of the United States, since under the Revised Statutes of the United States, section 4131, only citizens could act as officers of vessels engaged in the commerce of the United States.—*Buckley v. McDonald*, 483.

Contests—Citizenship.

8. The conclusion of the district court that the contestee—in an election contest in which his eligibility was attacked upon the ground of his alienage—who came to the United States at the age of fifteen, was a citizen of the United States no matter where born, was, under Revised Statutes of the United States, section 1993, correct, it having been found that his father was at the time of the son's birth a resident of Boston, Massachusetts, and continued to reside there until his death, and was also a captain in the merchant marine service of the United States.—*Buckley v. McDonald*, 483.

Contests—Citizenship—Constitution.

9. The fourteenth amendment to the constitution of the United States declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof" are citizens, is not exclusive as a definition of citizenship, but declaratory of the rights existing under the law at the time of its adoption and as affirmative of them, and has no application to acquisition of citizenship by birth in foreign lands of parents who were American citizens.—*Buckley v. McDonald*, 483.

ELECTRICITY.

Personal Injuries—Pleadings—Answer—Negative Pregnant.

1. The answer to a complaint, in an action for personal injuries against an electric light and power company, charging that defendants on a certain day hung the wire with which plaintiff came in contact over and across a trestle, which denied that any of the defendants, except one, so hung the wire, and that any of the defendants hung such wire only three feet or about three feet above the trestle, but alleged that a certain wire had been strung across it by one of the defendants a distance of about four and a half feet from said trestle, contained a negative pregnant and did not raise any issue as to whether the wire was placed in position before or after the erection of the trestle.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Personal Injuries—Trespassers—Instructions.

2. *Held*, in an action for personal injuries alleged to have been received by plaintiff on coming in contact with one of defendant electric light company's wires strung over a trestle upon which plaintiff was working as an employee of a mining company, that in the absence of anything to justify the conclusion that either the owner of the wire or the owner of the trestle was a trespasser as to the other, an instruction imposing on defendants the duty of inspecting their lines of wire was not objectionable on the ground that plaintiff was a trespasser to whom defendants owed no duty of inspection.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Duty of Defendant to Inspect Plant—Personal Injuries—Instructions.

3. An instruction given in an action for personal injuries, received by plaintiff through coming in contact with a wire charged with electricity, strung by an electric light and power company over a trestle upon which plaintiff was at work, to the effect that defendant was bound to maintain a system of inspection by which any change in the physical condition of the plant, poles or lines of wire, which might create or increase danger to human life, could be detected, correctly stated the law.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Duty of Defendant in Handling—Instructions.

4. The district court properly charged the jury in an action for personal injuries sustained by plaintiff while rightfully in pursuit of his occupation, by coming in contact with a wire charged with electricity, which wire had been strung by an electric light company over a trestle used by plaintiff in his work—that persons or corporations who handle a force of great inherent danger to the lives and safety of others are held by law to a high degree of care in handling it, and that the care required is measured by and equal to the danger.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Personal Injuries—Instructions—Prejudice.

5. In an action for injuries to plaintiff by coming in contact with defendant's live electric wire, overhanging a trestle on which plaintiff was working, an instruction that there was no evidence that defendants had actual notice of the erection of the trestle, and that their wires were in close proximity thereto, and that the jury should only consider this in the event they believed that the wire was hung before the trestle was erected, otherwise defendants were chargeable with knowledge of the existence of the trestle and the physical conditions surrounding it—was not prejudicial to defendant.—*Bourke v. Butte El. & P. Co. et al.*, 267.

ENABLING ACT.

See Constitution, 7, 8, 9; School Lands, 1, 2, 3, 4.

EQUITY.

See, also, Accounting, 3.

Mortgages—Foreclosure—Adjustment of Equities.

1. (On rehearing.) Where defendant and plaintiff's assignor had an accounting of all dealings between them, and defendant executed notes and a mortgage to secure the balance found due from him to his assignor, and it appeared, in a suit brought by plaintiff to foreclose the mortgage, that his assignor had held the record title to a separate tract of land not covered by the mortgage, in order to secure a sum which was afterward included in the accounting, and had agreed to convey such separate tract to defendant, but had not

released such tract from its position as security, the court, in decreeing foreclosure, should adjust all equities arising out of the transaction, and require plaintiff, who had succeeded to his assignor's title to the separate tract, to convey such tract to defendant, on the payment by defendant of the sum which the separate tract was held to secure, or so much thereof as remained unpaid after foreclosure and settlement of the mortgage, together with interest, taxes, and assessments on such tract.—*Keely v. Gregg et al.*, 216.

Public Lands—Fraud—Concealment of Equities—Rights of Parties.

2. (On rehearing.) The fact that a person perfecting the title to script land was acting as trustee for another, and that both he and his *cestui que trust* intended to conceal from the federal land office their true relations, does not preclude the enforcement of the trust, where all the facts were known to and considered by the government officials before issuing the patent, and the government knowingly and willingly conveyed the land to the trustee, leaving him and his *cestui que trust* to settle the equities between themselves in the courts after patent issued.—*Keely v. Gregg et al.*, 216.

Jury Trial—District Courts—Directing Verdict.

3. Where the cause of action stated in the complaint is one of purely equitable cognizance, and no issue is presented which would entitle either of the parties to a jury trial, the court may direct the jury in attendance to return a verdict, even though the evidence be conflicting.—*Short v. Estey et al.*, 261.

District Courts—Directing Verdict—Findings.

4. The rendition of a verdict by direction of the court, in an action involving questions of equitable cognizance, is equivalent to a finding of the court for the party in whose favor it was rendered.—*Short v. Estey et al.*, 261.

Trustees—Deed Absolute—Evidence—Directing Verdict.

5. Plaintiff, in an action to obtain a decree declaring defendants trustees for him of the legal title to an undivided interest in a mining claim, and for an accounting, testified that he had conveyed his interest to defendants under a written agreement signed by one of the defendants to the effect that upon removal of his incapacity occasioned by over-indulgence in drink, the same be returned to him; and that defendants had accounted to him for the rents for a period of two years. The deed from plaintiff to defendants was duly acknowledged and recorded. The alleged agreement was in the handwriting of plaintiff, and neither acknowledged nor recorded. The defendants' evidence tended to show that they had bought the interest, giving in consideration \$1,000 and a one-half interest in another mining claim; that plaintiff never demanded a reconveyance, or an accounting until shortly before the action was brought—a period of ten years, and that they had never accounted to plaintiff. *Held*, that the court was justified by the evidence in directing the jury to find for the defendants to the effect that the conveyance had been made in pursuance of an absolute sale for value.—*Short v. Estey et al.*, 261.

Mines—Adverse Claim.

6. A suit to determine an adverse claim to mining property is one of equitable cognizance.—*Kirby v. Higgins et al.*, 518.

ESCHEATED ESTATES.

Recovery—Limitations—Statutory Construction.

1. Under the provisions of Political Code, section 5162, the limitation of twenty years prescribed by Code of Civil Procedure, see-

tion 2253, within which to file petition in the district court to determine one's heirship to escheated property, is exclusive, and the limitation periods prescribed for ordinary actions have no application to such a proceeding.—*In re Pomeroy*, 69.

Recovery—Statutes.

2. Sections 1867-1869, inclusive, of the Civil Code, granting the right of succession to aliens and providing a mode by which non-resident aliens can be paid out of the treasury of the state, under certain limitations, after property of their ancestor has been converted and its proceeds turned over to the state treasurer, have no application to cases in which citizens of the United States appear as claimants.—*In re Pomeroy*, 69.

Recovery—Statutes—Retroactive Effect.

3. *Held*, under Code of Civil Procedure, section 3451, which declares that no part of said code is retroactive, unless expressly so declared, that property reduced to possession by the state in escheat proceedings prior to the enactment of the Code of Civil Procedure of 1895, cannot be recovered by the heir in a proceeding under section 2253 thereof.—*In re Pomeroy*, 69.

ESTOPPEL.

May be Proved Without Pleading When—Instructions.

1. While the general rule with respect to estoppel is that, in order to be effective, it must be pleaded, yet, where there has been no opportunity to allege it, it may be given in evidence with the same conclusive effect as if alleged, and an instruction to the effect that, in order to invoke the doctrine of estoppel, in an action for debt where the agency of the person who bought the goods was in question, it is necessary to plead it, was properly refused, it not appearing that plaintiff knew that he would have to rely upon an estoppel.—*Capital Lumber Co. v. Barth et al.*, 94.

Evidence—Admission. Without Objection—Submission to Jury.

2. *Held*, that where evidence of an estoppel, not pleaded, is admitted without objection, it may properly be submitted as if warranted by the pleadings.—*Capital Lumber Co. v. Barth et al.*, 94.

EVIDENCE.

Forcible Entry.

1. In an action under Code of Civil Procedure, section 2080, subdivision 1, for a forcible entry, evidence *held* insufficient to show that the entry was by violence.—*Spellman v. Rhode*, 21.

Forcible Entry—Evidence—Self-serving Declarations.

2. In an action for forcible entry, evidence in behalf of plaintiff, that before the act complained of, plaintiff stated that he claimed one hundred and sixty acres, pointed out to witness the land he desired to take, and that the land pointed out was that in dispute, was incompetent, the statements so made to witness having been self-serving declarations.—*Spellman v. Rhode*, 21.

Contracts—Counterclaims.

3. Evidence, introduced by defendant to prove a counterclaim for services as a real estate agent, no testimony having been offered by plaintiff in opposition thereto, *held* to be insufficient to prove a contract upon which the counterclaim—even upon an erroneous theory of the court as to the law applicable—could be supported.—*Marshall v. Trerise et al.*, 28.

Appeal—Review—Assignments of Error—Briefs.

4. On appeal from a decree and an order denying a motion for a new trial, in an action to quiet title to ore bodies, the supreme court may review the evidence to determine whether or not it supports the findings and decree, although the order of the trial court denying the motion for a new trial is not specified as error in appellant's brief.—Hickey et al. v. Anaconda Copper M. Co. et al., 46.

Review—Appeal—Record—Exhibits.

5. While ore samples introduced as exhibits in the trial of a case may be brought to the supreme court as original exhibits, under the rules of that court, yet they are not required to be taken up as a part of the evidence in the case on review.—Hickey et al. v. Anaconda Copper M. Co. et al., 46.

Appeal—Record—Contents.

6. Code of Civil Procedure, section 1173, does not require that the record on appeal must show that it embraces *all* the evidence introduced at the trial of the case, but only such as is necessary to make the statement truly represent the case.—Hickey et al. v. Anaconda Copper M. Co., 46.

Mines—Expert Witnesses—Prospectors.

7. A question asked of a locator of a mining claim, in an action to quiet title to ore bodies, whether a certain shaft had been sunk on the discovery vein, did not call for expert or opinion testimony, so as to bring the witness within a stipulation by which each side agreed to confine itself to a certain number of geological and expert witnesses.—Hickey et al. v. Anaconda Copper M. Co., 46.

Mines—Location—Patents—Findings.

8. In an action to determine extralateral mining rights, evidence held insufficient to support a finding that the location of plaintiff's claim was prior to the location of either the O. or N. claims, and that the patent to plaintiff's claim was issued prior to the patents to such other claims.—Hickey et al. v. Anaconda Copper M. Co., 46.

Oral—Partnership Sale of Entire Stock by One Partner—Agreement—Contents.

9. Where, in an action brought by a member of a partnership to recover the value of his interest in the partnership property, sold to a stranger by his copartner in violation of Civil Code, section 3232, subsection 3, some of plaintiff's witnesses were questioned about the partnership agreement but made no statements as to the contents of the writing, an offer to prove by oral testimony that the wrongdoing partner had authority under its terms to make the sale, was properly rejected, it not having been shown that the writing was lost or destroyed.—Doll v. Hennessy Mercantile Co., 80.

Insufficiency—Appeal—New Trial.

10. The supreme court will not ordinarily determine whether the evidence is insufficient to sustain the verdict, when a new trial is ordered for errors committed during the trial.—Doll v. Hennessy Mercantile Co., 80.

Insufficiency—New Trial—Joint Motion—Assignment of Error as to One Defendant.

11. In an action against joint defendants for goods sold and delivered, where the issue of fact was whether the person who purchased the goods was authorized to do so as agent for defendants, an assignment of error that the evidence was insufficient to sustain the verdict as to one defendant did not call for a new trial as to

both defendants, and a joint motion for a new trial, so far as based on such assignment, was properly overruled.—*Capital Lumber Co. v. Barth et al.*, 94.

Estoppel—Admission Without Objection—Submission to Jury.

12. *Held*, that where evidence of an estoppel, not pleaded, is admitted without objection, it may properly be submitted as if warranted by the pleadings.—*Capital Lumber Co. v. Barth et al.*, 94.

Practice—Appeal—Record.

13. When the question raised by appellant has to do with the admissibility of a particular item of evidence which, if not rejected, would have tended to prove the issue, the record need not contain all of the evidence.—*Mackel v. Bartlett*, 123.

Conflicting—Appeal.

14. Where the evidence is conflicting, the verdict will not be disturbed on appeal.—*Lehman v. Knapp*, 133.

Claim and Delivery—Preponderance—Instructions.

15. In an action of claim and delivery, the court charged that plaintiff, in order to recover, must show by a preponderance of the evidence that she was the owner of the property, and further charged that defendant sheriff was entitled to a verdict if the jury believed, "from a preponderance of all the evidence," that plaintiff's husband, under an attachment against whom the property was taken by defendant, was the owner of the property. *Held*, that the latter instruction was misleading, in the absence of any charge that defendant would be entitled to recover if the evidence did not preponderate on either side.—*Chan v. Slater, Sheriff*, 155.

Claim and Delivery—Instructions—Title—"Clear" Preponderance.

16. A charge, in an action of claim and delivery, that plaintiff must establish her title to the property by a "clear" preponderance of the evidence is technically erroneous, as a bare preponderance of the evidence would be sufficient.—*Chan v. Slater, Sheriff*, 155.

Claim and Delivery—Declarations—*Res Gestae*.

17. In an action in claim and delivery, evidence of declarations made by plaintiff's husband, while apparently in exclusive possession and control of the property in controversy and under an attachment against whom the property was taken by defendant sheriff, that he was the owner of it, was admissible, as part of the *res gestae*, to characterize the possession.—*Chan v. Slater, Sheriff*, 155.

Claim and Delivery—Declarations.

18. In claim and delivery, on the issue of whether a wife's title to property was merely colorable, and was held by her solely to shield such property from her husband's creditors, declarations of the husband, made by him while in exclusive possession and control of the property, that he was the owner thereof, were admissible, not as absolutely binding upon her, but as substantive evidence reflecting upon the *bona fides* of her claim.—*Chan v. Slater, Sheriff*, 155.

Restriction to Special Purpose.

19. The fact that evidence was admitted without objection did not render erroneous the action of the court in limiting its scope and effect to a particular purpose for which alone it was competent.—*Chan v. Slater, Sheriff*, 155.

Accounting—Appeal—Findings—Conclusiveness.

20. Where it appeared, in an action for an accounting, that the parties had invested their funds jointly in a common business during a period of over twenty years, without any definite plan or arrangement, without any accounting made or demanded on either side for many years, and with never a settlement, the district court thus being able to do no more than make a reasonably fair estimate as to the amount due from one party to the other, its findings will not be disturbed, since it is impossible to say from the showing made, that the preponderance of the evidence is against them or any of them.—*Union Bank & Trust Co. v. Knobb*, 167.

Practice—Objection to Introduction of—Effect.

21. An objection to the introduction of any evidence confesses, for the purposes of the objection, the truth of the allegations of the complaint which are sufficiently pleaded.—*Hensley v. City of Butte et al.*, 206.

Trustees—Deed Absolute—Directing Verdict.

22. Plaintiff, in an action to obtain a decree declaring defendants trustees for him of the legal title to an undivided interest in a mining claim, and for an accounting, testified that he had conveyed his interest to defendants under a written agreement signed by one of the defendants to the effect that upon removal of his incapacity occasioned by over-indulgence in drink, the same be returned to him; and that defendants had accounted to him for the rents for a period of two years. The deed from plaintiff to defendants was duly acknowledged and recorded. The alleged agreement was in the handwriting of plaintiff, and neither acknowledged nor recorded. The defendants' evidence tended to show that they had bought the interest, giving in consideration \$1,000 and a one-half interest in another mining claim; that plaintiff never demanded a reconveyance, or an accounting until shortly before the action was brought—a period of ten years, and that they had never accounted to plaintiff. *Held*, that the court was justified by the evidence in directing the jury to find for the defendants to the effect that the conveyance had been made in pursuance of an absolute sale for value.—*Short v. Estey et al.*, 261.

Personal Injuries—Damages—Earning Capacity.

23. Evidence as to the wages received by plaintiff, in an action for personal injuries, a year prior to the date of the accident was admissible as bearing on his earning capacity.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Personal Injuries—Excessive Damages—Appeal.

24. Where, in an action for personal injuries, the evidence was such that the jury might have found that the injuries sustained were permanent, and that plaintiff, who was forty-five years of age and had previous to the accident earned \$3.50 per day, would not thereafter be able to earn money, a verdict of \$20,000 in his favor will not be set aside on appeal as excessive.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Criminal Law—Grand Larceny—Sufficiency.

25. In a prosecution for grand larceny, of which defendant was charged jointly with two others, evidence which showed knowledge on the part of the defendant and his associates of the prosecuting witness' possession of the property taken; their destitute condition at, and for some time prior to, the date of the crime; an opportunity to commit the theft; the defendant's intimacy with his associates; the fact that one of them had pawned a watch stolen from the

prosecuting witness and that defendant furnished the money to redeem it; the deposit by the defendant of bills the same in number and denomination as those stolen; and his inability to explain satisfactorily how he came by them, *held*, sufficient to establish the larceny, and to go to the jury upon the question whether or not defendant was connected with it as an aider or abettor.—State v. Wells, 291.

Criminal Law—Grand Larceny—Declarations.

26. While, after the purpose of a conspiracy has been accomplished, evidence of acts or declarations of defendant's associates, as against the defendant, is hearsay, yet where, in a prosecution for grand larceny, information was elicited by the prosecuting witness from one of the associates of defendant, as to the whereabouts of one of the articles stolen, without being told how it came to be at the place indicated, evidence of such information was properly admitted as relevant to the inquiry whether in fact a larceny had been committed.—State v. Wells, 291.

Grand Larceny—Admission—Harmless Error.

27. Where, in a prosecution for grand larceny, the principal fact—the larceny—had been established, and the inquiry was as to the defendant's guilty connection with the theft, the admission in evidence of statements made to the prosecuting witness by one of the defendant's associates in the crime, as to the whereabouts of one of the articles stolen, if error, was error without prejudice, since the evidence in nowise incriminated the defendant.—State v. Wells, 291.

Grand Larceny—Cross-examination—Impeaching Witness.

28. The complaining witness in a prosecution for grand larceny was examined before a committing magistrate, his testimony reduced to writing, and signed by him. His statements at the trial showed a discrepancy between his testimony formerly given and the facts then sworn to as to certain particulars. The question was thereupon asked him on cross-examination whether his testimony at the preliminary examination, was true or false. *Held*, that the answer to this question was properly excluded, since the purpose of the statute (Code of Civil Procedure, sections 3379, 3380) had been served by calling the discrepancy to the attention of the jury, who were the judges of the credibility of the witness.—State v. Wells, 291.

Trial—Assignment—Objection too Broad.

29. An objection to testimony of an assignment of a claim against an estate, which went to *any* testimony as to the assignment, whereas the purpose of counsel in making the objection was to exclude oral evidence of it for the reason that it had been made in writing, was too broad, since, by sustaining the objection as made, proof of the assignment would have been impossible; while it would have been proper to limit the effect of the evidence, by reason of the failure of counsel for appellant to so request, he may not complain of the ruling as made.—Dorais v. Doll et al., 314.

Trial—Witnesses—Motion to Strike Out too Broad.

30. A motion to strike out the testimony of two witnesses is too board where the evidence of one of them was competent for a particular purpose.—Dorais v. Doll et al., 314.

Oral Assignment—Sufficiency—Findings.

31. Evidence of an oral assignment of a claim, to which no legal objection was interposed, was sufficient to justify a finding that the assignee was the owner of the claim, though there was a written assignment which had been lost, and though the best evidence was not introduced.—Dorais v. Doll et al., 314.

Actions Against Administrators—Exclusion—Waiver.

32. In an action against the administrator of an estate to recover on negotiable paper, plaintiff's offered testimony was excluded as incompetent, under the provisions of section 3162 of the Code of Civil Procedure, as amended by Session Laws, 1897, page 245. Proof of decedent's testimony on a former trial was then introduced. The preservation of decedent's testimony had not been made to appear to the court up to the time of its introduction. *Held*, that by failure to renew his offer after the court had been made cognizant of the preservation of decedent's testimony, plaintiff waived any error in excluding the testimony in the first instance.—*Harrington v. Butte & Boston M. Co. et al.*, 330.

Trial—Action Against Administrator—Witnesses.

33. Section 3162 of the Code of Civil Procedure, as amended by Act of 1897 (Session Laws 1897, p. 245), which provides that parties to an action against an executor or administrator upon a claim against an estate of a deceased person cannot be witnesses, precludes plaintiff, in an action against the administrator of an estate to recover on negotiable paper, from testifying to transactions had with a third person, if the proof of such transactions tends to establish plaintiff's claim against the estate.—*Harrington v. Butte & Boston M. Co. et al.*, 330.

Instructions—Invasion of Province of Jury.

34. To instruct the jury that certain evidence proves a particular fact is erroneous, in that it invades the province of the jury.—*Harrington v. Butte & Boston M. Co. et al.*, 330.

Railroads—Killing Live Stock—*Res Gestae*.

35. In an action against a railroad company for the killing of live stock, brought under section 951 of the Civil Code, the testimony of a witness that the section boss showed him where the animal was when struck and stated that after it was struck he killed it to end its sufferings, was not admissible as *res gestae*.—*Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co.*, 338.

Railroads—Killing Live Stock—Motion to Strike.

36. Where, in an action against a railroad company for the killing of live stock, a witness was permitted, without objection to testify to certain declarations of a section boss who witnessed the accident, and counsel for defendant thereupon cross-examined the witness, notwithstanding the evidence was clearly hearsay, and then for the first time moved to have it stricken out, the effort to exclude it came too late, and the district court properly denied the motion.—*Poindexter & Orr Live Stock Co., v. Oregon Short Line R. Co.*, 338.

Railroads—Killing Live Stock—Pleadings—Proof.

37. *Held*, in an action against a railroad company to recover for the killing of live stock, under Civil Code, section 951, that proof of an injury to an animal which would inevitably result in its death, substantially supports an allegation of killing.—*Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co.*, 338.

Indians—Contracts—Intoxicating Liquors.

38. Where recovery was had on a contract other than for intoxicating liquors sold to defendant, the district court properly excluded evidence and refused instructions relative to defendant's status as an Indian maintaining tribal relations.—*Kalispell L. & T. Co. v. McGovern et al.*, 394.

Contracts—Cattle—Delivery.

39. The district court, in an action brought to recover damages for the breach of a contract which called for the delivery of certain beef cattle, did not commit error in not admitting evidence to show that it was the intention of the parties that delivery of the cattle should be made at the ranch of defendant, where it was apparent that the contract was so construed by the court, as evidenced by the instructions submitted, as well as by the plaintiff, who had sent agents to defendant's ranch to demand delivery there.—*Great Falls Meat Co. v. Jenkins*, 417.

Appeal—Conflict—Result.

40. The judgment of the district court will not be disturbed on appeal on the ground of insufficiency of the evidence, where a substantial conflict on material issues is shown, and where upon a re-examination of it by the trial court a new trial was refused.—*Great Falls Meat Co. v. Jenkins*, 417.

Attorneys—Disbarment—Forgery.

41. To warrant a finding against the accused in a disbarment proceeding, on a charge of forgery of an undertaking on attachment, the evidence must be clear and definite.—*In re Thresher*, 441.

Claim and Delivery—Value of Property—Exclusion.

42. Where, in an action in claim and delivery, the verdict fixed the value of the property in controversy at the price put upon it by defendant sheriff in his testimony, he cannot be heard to complain of a ruling of the court excluding offered testimony tending to show the price at which it sold at sheriff's sale.—*Webster v. Sherman*, 448.

Husband and Wife—Declarations.

43. Testimony of statements made by the husband of plaintiff, in an action in claim and delivery, to his creditors that the property in controversy belonged to him was properly excluded, where it was not followed up by any proof or offer of proof that the attaching creditors dealt with the husband upon the credit of the property in question.—*Webster v. Sherman*, 448.

Claim and Delivery—Letters—Creditors.

44. A letter written by the husband of plaintiff, in an action in claim and delivery, to his creditors, in which he had listed the property in dispute as his, was properly excluded, where it appeared that the purpose of the writer in indicting it, and of the creditors in having it written was to enable the creditors to secure a loan for the writer from another bank.—*Webster v. Sherman*, 448.

Mines—Adverse Claims—Sufficiency—Review.

45. Evidence reviewed in an action to determine an adverse claim to mining property, and held insufficient to support a verdict in favor of plaintiff, in that it wholly failed to identify the ground claimed.—*Kirby v. Higgins et al.*, 518.

Exclusion—Appeal.

46. If the trial court's ruling upon the exclusion of evidence is correct, the reason upon which it is founded is immaterial.—*Brown et al. v. Daly*, 523.

EXCESSIVE DAMAGES.**Personal Injuries—Appeal—Burden of Showing Error.**

1. The burden of showing error on the ground of excessive damages awarded in a personal injury case rests upon appellant, and in the absence of a clear showing the supreme court will not interfere.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Personal Injuries—Evidence—Appeal.

2. Where, in an action for personal injuries, the evidence was such that the jury might have found that the injuries sustained were permanent, and that plaintiff, who was forty-five years of age and had previous to the accident earned \$3.50 per day, would not thereafter be able to earn money, a verdict of \$20,000 in his favor will not be set aside on appeal as excessive.—*Bourke v. Butte El. & P. Co. et al.*, 267.

EXECUTORS.

See Administrators.

EXHIBITS.**Appeal—Review of Evidence—Record.**

1. While ore samples introduced as exhibits in the trial of a case may be brought to the supreme court as original exhibits, under the rules of that court, yet they are not required to be taken up as a part of the evidence in the case on review.—*Hickey et al. v. Anaconda Copper M. Co.*, 46.

Appeal—Record—Certificate of Judge—Imports Verity.

2. In the absence of any showing that exhibits, alleged to have been omitted from the record on appeal are material to the consideration of the appeal, the certificate of the presiding judge will be accepted by the appellate tribunal as importing verity, and the statement considered as containing all the matter necessary to make it truly represent the case.—*Hickey et al. v. Anaconda Copper M. Co.*, 46.

Election Contests—Appeal—Marked Ballots.

3. *Held*, on appeal from a judgment in an election contest, that ballots, alleged to have been used on the trial and brought to the supreme court in a box to which was attached a memorandum of the trial judge to the effect that he had received the box from the clerk of the district court, had never opened it, but believed that it contained the original ballots, may not be looked to for the purpose of ascertaining whether any of said ballots bear distinguishing marks, because not identified as the original ballots in their original form as introduced in evidence in the court below, and because of the absence of a certificate of the judge to that effect. (Rule VIII, Subd. 1, Rules of Supreme Court.)—*Pledge v. Griffith*, 191; *Pledge v. Tweedie*, 197.

Mines—Adverse Claims—Maps—Record.

4. Where, in a suit to determine an adverse claim to mining property, maps are used in connection with the oral testimony of witnesses, identifying marks should be placed upon the maps, with proper references to such marks in the record, so as to make any allusion to them by the witnesses intelligible to the appellate tribunal in reviewing the evidence.—*Kirby v. Higgins et al.*, 518.

EXPERT WITNESSES.

See Witnesses.

EXTREME CRUELTY.

See Divorce, 1, 2.

FAILURE OF PROOF.

See Variance.

“FAIR TRIAL” LAW.

See District Courts, 2.

FENCES.

See Public Lands 3-5.

FINDINGS.

Disregard of—General Verdicts—Appeal.

1. Where the district court, in an action for debt, entered judgment upon a general verdict, and in doing so, ignored certain special findings which were contradictory and inconsistent, the appellants, for failure to object to the court's action or to move for judgment upon the findings, are precluded from complaining of the inconsistencies in the findings for the first time on appeal.—*Capital Lumber Co. v. Barth et al.*, 94.

Accounting—Conclusiveness—Appeal.

2. Where it appeared, in an action for an accounting, that the parties had invested their funds jointly in a common business during a period of over twenty years, without any definite plan or arrangement, without any accounting made or demanded on either side for many years, and with never a settlement, the district court thus being able to do no more than make a reasonably fair estimate as to the amount due from one party to the other, its findings will not be disturbed, since it is impossible to say from the showing made, that the preponderance of the evidence is against them or any of them. *Union Bank & Trust Co. v. Knobb*, 167.

Probate Proceedings—Real Estate—Order of Sale—*Res Judicata*.

3. (On motion for rehearing.) A finding by a probate court on an application by an executor to sell real estate, that the real estate, alleged to have been devised to appellants for a valuable consideration, belonged to the estate, was outside of its jurisdiction, since the question of title could not be inquired into by it, and such finding, being wholly immaterial and upon a subject outside of the purview of the application, may not be considered *res judicata*, upon affirmance of the order of sale by the supreme court.—*In re Tuohy's Estate*, 239.

District Courts—Equity—Directing Verdict—Equivalent to.

4. The rendition of a verdict by direction of the court, in an action involving questions of equitable cognizance, is equivalent to a finding of the court for the party in whose favor it was rendered.—*Short v. Estey et al.*, 261.

Oral Assignment—Evidence—Sufficiency.

5. Evidence of an oral assignment of a claim, to which no legal objection was interposed, was sufficient to justify a finding that the assignee was the owner of the claim, though there was a written assignment which had been lost, and though the best evidence was not introduced.—*Dorais v. Doll et al.*, 314.

FORBEARANCE TO SUE.

See Negotiable Paper, 1; Contracts, 4.

FORCIBLE ENTRY.

Pleadings—Complaint—Sufficiency—Appeal—Theory of Case.

1. Where the case was tried on the theory that the complaint stated a cause of action for a forcible entry under Code of Civil Pro-

cedure, section 2080, without objection by either party, its sufficiency will be determined on this theory on appeal, although it contains some allegations more appropriate to an action of ejectment.—*Spellman v. Rhode*, 21.

Complaint—Sufficiency.

2. A complaint alleging that plaintiff was in possession of certain described lands, engaged in cultivating them as a homestead settlement, and that defendant forcibly and without right entered thereon, and by force and arms, ejected plaintiff therefrom, states a cause of action for a forcible entry under Code of Civil Procedure, section 2080, subdivision 1.—*Spellman v. Rhode*, 21.

Neither Title nor Right of Possession Issuable.

3. In an action for forcible entry under Code of Civil Procedure, section 2080, neither the title nor the right to the possession of land may be made matters of investigation.—*Spellman v. Rhode*, 21.

Evidence.

4. In an action under Code of Civil Procedure, section 2080, subdivision 1, for a forcible entry, evidence held insufficient to show that the entry was by violence.—*Spellman v. Rhode*, 21.

Pleadings—Proof—Variance.

5. Where, in an action under Code of Civil Procedure, section 2080, subdivision 1, for a forcible entry, the evidence showed a peaceable entry, and a subsequent forcible turning out of plaintiff, which conduct is made a forcible entry by subdivision 2 of said section, the variance was such as to constitute a failure of proof, within section 772 of the same code, providing that when the allegation of the claim to which the proof is directed, is unproved in its general scope and meaning, it shall be regarded as a failure of proof.—*Spellman v. Rhode*, 21.

Evidence of Title—Materiality.

6. In an action of forcible entry, evidence that before the entry plaintiff pointed out to witness the land in dispute, as part of a tract he intended to take as a homestead, tending to show a claim of homestead right merely, that is, inchoate title to the land in question, was immaterial, since the question of title could not become a material issue.—*Spellman v. Rhode*, 21.

Evidence—Self-serving Declarations.

7. In an action for forcible entry, evidence in behalf of plaintiff, that before the act complained of plaintiff stated that he claimed one hundred and sixty acres, pointed out to witness the land he desired to take, and that the land pointed out was that in dispute, was incompetent, the statements so made to witness having been self-serving declarations.—*Spellman v. Rhode*, 21.

Abandonment.

8. Abandonment of the land by plaintiff, in an action for forcible entry, subsequent to the wrong, furnishes no justification of the act complained of; neither is abandonment a pertinent inquiry in such an action.—*Spellman v. Rhode*, 21.

Findings—Verdict.

9. Where, in an action for a forcible entry on certain described land, the evidence showed that only part of the land was in dispute, a verdict to the effect that the jury found for plaintiff, and that he was entitled to possession of the land shown by the evidence to be in dispute, would, if the irrelevant finding as to right of possession

were stricken out, allow a judgment for restitution of land not in controversy, and was erroneous.—*Spellman v. Rhode*, 21.

Defense—Acts of Plaintiff After Entry.

10. In an action for forcible entry, acts of plaintiff subsequent to the entry are no defense.—*Spellman v. Rhode*, 21.

Counterclaims.

11. Under Code of Civil Procedure, sections 690-692, providing for counterclaims, a counterclaim for money in an action for a forcible entry, cannot be availed of.—*Spellman v. Rhode*, 21.

FRAUDS.

See, also, Trusts, 2, 3; Equity, 2.

HARMLESS ERROR.

Election Contests—Counting of Illegal Votes.

1. The votes cast for respondent in an election contest, in the county numbered 619; of these 37 were cast at a precinct located on an Indian reservation. The total vote of his opponent was 539, of which 12 were cast at said precinct. *Held*, that the reception of the ballots cast at said precinct, and alleged to be illegal, did not prejudice the rights of the unsuccessful candidate, nor those of the elector who instituted the contest proceedings, since, after deduction of the votes cast at that precinct for each candidate, from the total vote received by each in the county, the result of the election would not be affected.—*Pledge v. Griffith*, 191; *Pledge v. Tweedie*, 197.

Grand Larceny—Evidence.

2. Where, in a prosecution for grand larceny, the principal fact—the larceny—had been established, and the inquiry was as to the defendant's guilty connection with the theft, the admission in evidence of statements made to the prosecuting witness by one of the defendant's associates in the crime, as to the whereabouts of one of the articles stolen, if error, was error without prejudice, since the evidence in nowise incriminated the defendant.—*State v. Wells*, 291.

Claim and Delivery—Husband and Wife—Exclusive Possession—Instructions.

3. An instruction, in an action in claim and delivery, where there was not any proof or offer of proof that the creditors of plaintiff's husband had been dealing with the latter on the credit of the property claimed by plaintiff, which erroneously told the jury that her property could not be taken for the husband's debts unless it was in his sole and exclusive possession at the time it was seized by the sheriff, instead of at the time the attaching creditors dealt with him in good faith on the credit of it, could not have misled the jury, and was not reversible error.—*Webster v. Sherman*, 448.

Claim and Delivery—Conflicting Instructions—Third Party Claim.

4. The giving of conflicting instructions, in an action in claim and delivery, upon the necessity of making a third party claim to the sheriff, one of which instructions correctly stated the law, while the other was erroneous, but in appellant's favor, will not warrant a reversal.—*Webster v. Sherman*, 448.

HOMESTEADS.

See Public Lands, 6, 7, 8.

HUSBAND AND WIFE.

See, also, Claim and Delivery, 7, 11, 12, 18; Divorce.

Separate Property of Wife—Inventory.

1. *Held*, that the inventory of the wife's separate property, provided for in sections 221 and 222 of the Civil Code, is necessary to protect such property, only when it is in the husband's exclusive possession, and third persons deal with him on the credit of it without knowledge of the wife's claim.—*Chan v. Slater, Sheriff*, 155.

Earnings of Wife—Inventory.

2. *Obiter*; The earnings and accumulations of the wife, made after marriage, are not protected from seizure, where the husband is allowed to assume exclusive possession of them, unless the inventory provided for in sections 221 and 222 of the Civil Code has been filed.—*Chan v. Slater, Sheriff*, 155.

Separate Property of Wife—Liability for Husband's Debts.

3. Property acquired by the wife subsequent to the contracting of a debt by the husband cannot be held liable for such debt.—*Chan v. Slater, Sheriff*, 155.

Claim and Delivery—Instructions—Immaterial Issues.

4. Where, in an action of claim and delivery, the only issue was whether or not plaintiff's claim to the property was colorable only, and title assumed for the purpose of protecting the same against the claims of her husband's creditors, instructions in the language of sections 220, 222, and the latter part of section 227 of the Civil Code, relative to the separate property of the wife and its liability for the husband's debts, were on an immaterial issue and should not have been given.—*Chan v. Slater, Sheriff*, 155.

Personal Property—Sales—Presumptions.

5. *Quære*: Is section 4491 of the Civil Code, relative to transfers of personal property conclusively presumed to be fraudulent, applicable to transfers between husband and wife.—*Webster v. Sherman*, 448.

IDEM SONANS.

Criminal Law—Prosecuting Witness—Variance in Name.

1. Defendant was convicted of the crime of robbery. The information stated the name of the injured person as "Frank Rex," whereas his own testimony showed that it was "Frank Röck." There was not any showing that he was named, or had been known as, Frank Rex. *Held*, that, the names being unlike in sound or spelling, and the information having failed to disclose any description which made it at all certain that "John Rex" and "John Röck" were one and the same person, the variance was fatal to conviction.—*State v. Lee*, 203.

INDIANS.

Contracts—Intoxicating Liquors—Evidence.

1. Where recovery was had on a contract other than for intoxicating liquors sold to defendant the district court properly excluded evidence and refused instructions relative to defendant's status as an Indian maintaining tribal relations.—*Kalispell L. & T. Co. v. McGovern et al.*, 394.

INJUNCTIONS.

Cities—Special Improvements—Taxation—Void Levy.

1. Where a tax levied by a city for special improvement purposes was manifestly void under all circumstances and not merely "irregularly levied or demanded," the remedy provided by Political Code, sections 4024-4026, is not exclusive, but the aid of a court

of equity by way of injunction may be invoked to restrain the collection of such tax.—*Hensley v. City of Butte et al.*, 206.

Public Lands—Unlawful Fencing—Trespassers.

2. By unlawfully inclosing portions of the public domain, a person acquires no such right therein as will enable him to protect his possession against the trespasses of another person, by invoking the injunctive power of a court of equity.—*Clemmons v. Gillette et al.*, 321.

Public Lands—Unlawful Fencing.

3. Since a person who unlawfully fences a portion of the public domain, thus having only a tortious possession, cannot maintain an action against another for depasturing such land, he cannot have incidental relief, by way of injunction, to restrain the latter from continuing to depasture the land.—*Clemmons v. Gillette et al.*, 321.

INSTRUCTIONS.

Conflicting—Real Estate—Sale—Agents—Counterclaims.

1. In an action on a promissory note for \$700, where a counterclaim was interposed setting up that plaintiff was indebted to defendants in the sum of \$1,000 for services performed by one of them as real estate agent, instructions examined and held not to be conflicting.—*Marshall v. Trerise et al.*, 28.

Partnership—Sale of Entire Stock by One Partner—Value of Property—Jury—Weight of Evidence.

2. An instruction, in an action by one partner in a partnership against the purchaser of its entire stock in trade, which had been sold by his copartner in violation of Civil Code, section 3232, subsection 3, that the amount paid for property converted is not controlling as to value, unless it appears from the evidence that the same is the reasonable value, but the recovery should be based on the reasonable value of the property, if it exceeds the amount paid, or, if not, then upon the amount paid, was inconsistent with itself, contradictory in statement, and invaded the province of the jury by stating the weight they should attach to a particular portion of the evidence.—*Doll v. Hennessy Mercantile Co.*, 80.

Estoppel—May be Proved Without Pleading—When.

3. While the general rule with respect to estoppel is that, in order to be effective, it must be pleaded, yet, where there has been no opportunity to allege it, it may be given in evidence with the same conclusive effect as if alleged, and an instruction to the effect that, in order to invoke the doctrine of estoppel, in an action for debt where the agency of the person who bought the goods was in question, it is necessary to plead it, was properly refused, it not appearing that plaintiff knew that he would have to rely upon an estoppel.—*Capital Lumber Co. v. Barth et al.*, 94.

When Refusal not Error.

4. Where the instructions given fairly cover the issues involved, refusal to submit other instructions is not reversible error.—*Capital Lumber Co. v. Barth et al.*, 94.

Claim and Delivery—Evidence—Preponderance.

5. In an action of claim and delivery, the court charged that plaintiff, in order to recover, must show by a preponderance of the evidence that she was the owner of the property, and further charged that defendant sheriff was entitled to a verdict if the jury believed, "from a preponderance of all the evidence," that plaintiff's husband, under an attachment against whom the property was

taken by defendant, was the owner of the property. *Held*, that the latter instruction was misleading, in the absence of any charge that defendant would be entitled to recover if the evidence did not preponderate on either side.—*Chan v. Slater, Sheriff*, 155.

Claim and Delivery—Evidence—Title—"Clear" Preponderance.

6. A charge, in an action of claim and delivery, that plaintiff must establish her title to the property by a "clear" preponderance of the evidence is technically erroneous, as a bare preponderance of the evidence would be sufficient.—*Chan v. Slater, Sheriff*, 155.

Electricity—Personal Injuries—Trespassers.

7. *Held*, in an action for personal injuries alleged to have been received by plaintiff on coming in contact with one of defendant electric light company's wires strung over a trestle upon which plaintiff was working as an employee of a mining company, that in the absence of anything to justify the conclusion that either the owner of the wire or the owner of the trestle was a trespasser as to the other, an instruction imposing on defendants the duty of inspecting their lines of wire was not objectionable on the ground that plaintiff was a trespasser to whom defendants owed no duty of inspection.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Electricity—Duty of Defendant to Inspect Plant.

8. An instruction given in an action for personal injuries, received by plaintiff through coming in contact with a wire charged with electricity, strung by an electric light and power company over a trestle upon which the plaintiff was at work, to the effect that defendant was bound to maintain a system of inspection by which any change in the physical condition of the plant, poles or lines of wire, which might create or increase danger to human life, could be detected, correctly stated the law.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Electricity—Duty of Defendant in Handling.

9. The district court properly charged the jury in an action for personal injuries sustained by plaintiff while rightfully in pursuit of his occupation, by coming in contact with a wire charged with electricity, which wire had been strung by an electric light company over a trestle used by plaintiff in his work—that persons or corporations who handle a force of great inherent danger to the lives and safety of others are held by law to a high degree of care in handling it, and that the care required is measured by and equal to the danger.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Electricity—Personal Injuries—Prejudice.

10. In an action for injuries to plaintiff by coming in contact with defendant's live electric wire, overhanging a trestle on which plaintiff was working, an instruction that there was no evidence that defendants had actual notice of the erection of the trestle, and that their wires were in close proximity thereto, and that the jury should only consider this in the event they believed that the wire was hung before the trestle was erected, otherwise defendants were chargeable with knowledge of the existence of the trestle and the physical conditions surrounding it—was not prejudicial to defendant.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Favorable to Appellant—Effect.

11. A judgment will not be reversed for errors in instructions which are in favor of appellant.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Personal Injuries—Damages—Earning Capacity.

12. While an instruction should be given in an action for personal injuries in determining the amount of damages to be awarded for impairment of earning capacity in the future, to the effect that the compensation to be allowed should be such as will purchase an annuity equal to the difference between the annual earnings of plaintiff before the injury and the amount he might earn thereafter if any, yet where such a charge was not given and the one submitted on this question was not complained of or a more specific one asked, defendants may not be heard to contend that the jury was improperly instructed in this regard.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Personal Injuries—Damages.

13. In an action for personal injuries, an instruction that, if the jury found for plaintiff, in fixing his damages, they might consider mental and physical suffering caused by the injury, wages which plaintiff might have earned from the date of the injury to the date of the trial, and, if the injuries were permanent, any loss to him by reason of the impairment of his capacity to earn money in the future, was proper.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Criminal Law—Grand Larceny—Accomplices.

14. Defendant in a prosecution for grand larceny may not complain on appeal that an instruction, to the effect that the question whether he was an accomplice with his associates in the crime, or either of them, was solely for the jury to determine, had not been given in the exact form requested by him, if one in substance to that effect was submitted.—*State v. Wells*, 291.

Sales—Requisites.

15. A requested instruction which told the jury that before a person can recover for goods delivered by him, he must prove a request therefor by the party to whom they are delivered, was properly refused; because recovery may be had if delivery to, and acceptance of the goods by, the intended purchaser, and a promise expressed or implied, on the part of the purchaser to pay for them, are shown.—*Smith et al. v. Perham*, 309.

Sales—Recovery of Price.

16. An instruction in an action to recover for materials furnished, to the effect that the only question for the jury to determine was whether or not defendant received from plaintiff the goods in controversy, was erroneous, since the mere delivery of goods by one person to another is not of itself sufficient to create a liability for their value; in order to do so, such delivery and acceptance must have occurred under such circumstances as that the law will imply a promise to pay for them.—*Smith et al. v. Perham*, 309.

Prejudicial Error—Presumptions.

17. Prejudice will be presumed from the giving of an erroneous instruction, even if others were given which correctly state the law.—*Smith et al. v. Perham*, 309.

Negotiable Instruments—Indorsee in Due Course.

18. An instruction given in an action on negotiable paper, which told the jury that, where the holder took the paper under suspicious circumstances sufficient to put a reasonably prudent man upon inquiry, notwithstanding he had paid value for it, he could not recover, was, erroneous, his ability to recover being dependent under section 4035, Civil Code, not upon the nonexistence of suspicious circumstances, but

upon his good faith when he obtained possession of the paper as an indorsee in due course.—Harrington v. Butte & Boston M. Co. et al., 330.

Evidence—Invasion of Province of Jury.

19. To instruct the jury that certain evidence proves a particular fact is erroneous, in that it invades the province of the jury.—Harrington v. Butte & Boston M. Co. et al., 330.

Negotiable Instruments—Bad Faith.

20. An instruction which told the jury, in an action to recover on negotiable paper, that if there were any suspicious circumstances attending the purchase of the check in question, the holder was guilty of bad faith, and therefore could not recover, was erroneous, inasmuch as it was for the jury to determine from the evidence relating to the circumstances surrounding the transaction, whether such evidence in fact proved bad faith.—Harrington v. Butte & Boston M. Co. et al., 330.

Incomplete—Error.

21. An instruction which submits to the jury certain premises, but fails to state what conclusions might be drawn from such premises, is erroneous.—Harrington v. Butte & Boston M. Co. et al., 330.

Railroads—Killing of Live Stock—Negligence.

22. An instruction given in an action, brought under section 951 of the Civil Code, against a railroad company, for the killing of live stock, to the effect that the law presumed such killing to have been the result of the defendant's negligence, correctly stated the law, even though it appeared that while the animal was fatally injured by the locomotive and cars of the defendant, the actual killing was done by one of the defendant's employees to end its suffering. [Mr. Justice Milburn dissenting.]—Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co., 338.

Request for—Record—Appeal.

23. Where the record is silent as to what, if any, instructions were requested by appellant upon specific points in an action for breach of contract, he cannot complain that those submitted were not as specific as they should have been.—Great Falls Meat Co. v. Jenkins, 417.

Claim and Delivery—Crops—Ownership—Presumptions.

24. Where in an action in claim and delivery, it appeared that certain hay grown upon plaintiff's land had been seeded and harvested by her husband under an arrangement between them, an instruction to the effect that ownership of the land carries with it a *prima facie* presumption of ownership of the crops grown upon it correctly stated the law.—Webster v. Sherman, 448.

Claim and Delivery—Husband and Wife—Exclusive Possession—Harmless Error.

25. An instruction in an action in claim and delivery, where there was not any proof or offer of proof that the creditors of plaintiff's husband had been dealing with the latter on the credit of the property claimed by plaintiff, which erroneously told the jury that her property could not be taken for the husband's debts unless it was in his sole and exclusive possession at the time it was seized by the sheriff, instead of at the time the attaching creditors dealt with him in good faith on the credit of it, could not have misled the jury, and was not reversible error.—Webster v. Sherman, 448.

Claim and Delivery—Husband and Wife—Third Party Claims.

26. An instruction to the effect that, in order for a wife to maintain an action in claim and delivery for property taken for the debts of

her husband, it was necessary that she should have made a third party claim, and presented to the sheriff an affidavit in support thereof, was erroneous.—Webster v. Sherman, 448.

Conflicting Claim and Delivery—Third Party Claim—Harmless Error.

27. The giving of conflicting instructions in an action in claim and delivery, upon the necessity of making a third party claim to the sheriff, one of which instructions correctly stated the law, while the other was erroneous but in appellant's favor, will not warrant a reversal.—Webster v. Sherman, 448.

Claim and Delivery—Applicability to Evidence.

28. In an action of claim and delivery, an instruction that if a married woman allows her separate property to be so mixed with that of her husband as to become indistinguishable, or acquiesces in its being so mingled, it must, as to the husband's creditors, be treated as relinquished to him, was properly refused where there was no evidence of such mingling.—Webster v. Sherman, 448.

Claim and Delivery—Equipoise in Evidence.

29. An instruction telling the jury, in an action in claim and delivery, that plaintiff must prove the allegations of her complaint by a preponderance of the evidence, was equivalent to saying that if there was not any preponderance in her favor, or if the evidence was evenly balanced, she could not prevail, and the refusal of the court to specially instruct that if the evidence was evenly balanced the jury should find for defendant was not error.—Webster v. Sherman, 448.

Refusal—When not Error.

30. The refusal of an instruction not applicable to the facts presented is not error.—Webster v. Sherman, 448.

Claim and Delivery.

31. A requested instruction, in an action in claim and delivery, which stated that if the jury should find the evidence for and against any material allegation of plaintiff's complaint to be evenly balanced, then plaintiff had failed to prove her case and verdict should be for defendant, was misleading, where issues were made in the pleadings as to the ownership and value of the several items of property in question. The instruction would have been proper if it had said that the verdict should be for defendant *as to the property described in that allegation*.—Webster v. Sherman, 448.

Personal Injuries—Contributory Negligence—Assumption of Risk—Burden of Proof.

32. An instruction, in an action for personal injuries, which told the jury that the burden was upon defendant to show contributory negligence and assumption of risk, was not objectionable, where in other paragraphs of the charge they were informed that their verdict should be for the defendant in case *either* defense was established by a preponderance of the evidence.—Nord v. Boston & Mont. C. C. & S. M. Co., 464.

Criminal Law—Jury Trial—Constitution.

33. Where defendant in a prosecution for murder pleads "not guilty," an instruction to the jury to the effect that they could find him guilty of murder in either of its degrees, or of voluntary or involuntary manslaughter, but "you cannot find him not guilty," is in contravention of defendant's constitutional right (Constitution, Article III, section 16) to have the question of his guilt or innocence determined by a jury, of which right he cannot be deprived no matter how clear and unimpeached or free from suspicion the evidence may be.—State v. Koch, 490.

INTEREST.

See, also, Claim and Delivery, 10.

Pledges—Conversion—Accounting.

1. Where a pledgee of certain property sold the same on credit, without interest, the pledgor, on ratifying the sale and suing the pledgee for an accounting, was chargeable with interest on the loan secured by the pledge at the agreed rate to the date at which defendant received payment for the property sold sufficient to discharge the indebtedness, and not merely to the date of the sale.—*Demars v. Hudon*, 170.

INTOXICATING LIQUORS.

See Indians.

INVENTORY.

See Husband and Wife, 1, 2, 4.

JEOPARDY.

See Criminal Law, 16, 17, 19, 20, 21, 22.

JUDGMENTS.

Personal—Mechanics' Liens—Invalid Lien.

1. A party seeking to foreclose a mechanic's lien may have a personal judgment in the same action against the person liable for the materials furnished and the work and labor done, though he fails to establish his lien.—*Western Plumbing Co. v. Fried*, 7.

For Fine—Criminal Law—Justices' Courts.

2. A judgment rendered by a justice of the peace, in a case of misdemeanor, imposing a fine, with imprisonment in the county jail until the fine be paid, is not a judgment for fine only, within the meaning of section 2714 of the Penal Code.—*State ex rel. Hodgdon v. District Court*, 119.

JUDICIAL NOTICE.

Statutes of Other States—Pleading.

1. The courts of this state will take judicial notice of such matters only as are enumerated in section 3150 of the Code of Civil Procedure, and the statutes of sister states not being included, a complaint, brought under a statute of Idaho for the killing of cattle by a railroad company, which fails to plead such statute, is therefore fatally defective.—*McKnight v. Oregon Short Line R. Co.*, 40.

JURISDICTION.

See, also, Contempt, 6.

District Courts—Probate Proceedings.

1. The district court sitting as a court of probate has only such powers as are expressly conferred upon it by statute, and such as are necessarily implied in order to carry out those expressly conferred. In *re Tuohy's Estate*, 230.

District Courts—Probate—Real Estate—Order of Sale—Title.

2. The district court when sitting in probate, on an application for an order of sale of real estate made under section 2671 of the Code of Civil Procedure, may not enter into an investigation of

questions of title to property included in the order and alleged by objectors to the granting of such order to have been devised for a valuable consideration, and for that reason exempt from sale until after the disposition of all the other property belonging to the estate.—*In re Tuohy's Estate*, 230.

Justices of the Peace—Ejectment—Certifying Case to District Court—*Mandamus*.

3. A complaint filed in a justice of the peace court, if stating a cause of action in ejectment, does not give the justice jurisdiction for any purpose, so that he cannot confer jurisdiction on the district court by certifying the case to it; and the latter court cannot be compelled by *mandamus* to hear and determine it.—*State ex rel. Lott v. District Court et al.*, 356.

Justices of the Peace—Unlawful Detainer—Certifying Case to District Court—*Mandamus*.

4. If the question of title may not be raised in an action in unlawful detainer, all allegations respecting it in the pleadings are surplusage, and the justice of the peace court has jurisdiction to hear the cause, of which jurisdiction it cannot divest itself by certifying the cause to the district court (Code of Civil Procedure, section 1486); and *mandamus* will not lie to compel the latter court to hear and determine the case so certified to it.—*State ex rel. Lott v. District Court et al.*, 356.

Costs—Taxation—Notice—Waiver.

5. Where a party against whom costs awarded on appeal were sought to be recovered under section 1869 of the Code of Civil Procedure, had not been served with a memorandum of such costs, his special appearance, for the purpose of submitting a motion to strike out the memorandum as a whole and also a motion to tax the cost-bill on its merits, did not give the court jurisdiction to tax the costs, and *certiorari* lies to annul such order.—*State ex rel. Riddell v. District Court et al.*, 529.

JURY.

Mines—Action to Quiet Title—Ore Bodies—Trial by.

1. In an action brought for the purpose of quieting title to ore bodies, the parties are not entitled, as a matter of right, to a trial by jury.—*Hickey et al. v. Anaconda Copper M. Co. et al.*, 46.

Pledges—Accounting—Equity—Trial by.

2. A suit brought by a pledgor to compel the pledgee to render an accounting of the proceeds derived from the use of the property pledged and to recover the price realized from a wrongful sale thereof, is an action for an accounting cognizable in a court of equity, in which the defendant is not entitled to a jury trial.—*Demars v. Hudson*, 170.

Probate Proceedings—Real Estate—Order of Sale—Trial by—Written Demand.

3. Where no written demand for a trial by jury had ever been filed (Code of Civil Procedure, sections 2340, 2923, 2940) by appellants, against whose objections an order, directing the sale of certain real estate, was made by the district court sitting in probate, a jury trial of the issues presented was properly denied; and a demand at the close of the written objections for a jury, which demand was not called to the attention of the court or judge until the hearing began, did not supply the omission.—*In re Tuohy's Estate*, 230.

Trial by—Equity—District Courts—Directing Verdict.

4. Where the cause of action stated in the complaint is one of purely equitable cognizance, and no issue is presented which would entitle either of the parties to a jury trial, the court may direct the jury in attendance to return a verdict, even though the evidence be conflicting.—*Short v. Estey et al.*, 261.

Instructions—Evidence—Invasion of Province of Jury.

5. To instruct the jury that certain evidence proves a particular fact is erroneous, in that it invades the province of the jury.—*Harrington v. Butte & Boston M. Co. et al.*, 330.

JUSTICES OF THE PEACE.

Criminal Law—Appeals—Notice—County Attorneys.

1. Failure to serve notice upon the county attorney of an appeal to the district court from a judgment of conviction had in a justice's court is not ground for the dismissal of the appeal.—*State ex rel. Hodgdon v. District Court*, 119.

Criminal Law—Judgments for Fine.

2. A judgment rendered by a justice of the peace, in a case of misdemeanor, imposing a fine, with imprisonment in the county jail until the fine be paid, is not a judgment for fine only, within the meaning of section 2714 of the Penal Code.—*State ex rel. Hodgdon v. District Court*, 119.

Criminal Law—Appeals—Undertaking—Necessity.

3. An undertaking on appeal from a judgment of conviction for a misdemeanor, rendered by a justice of the peace imposing a fine and remanding defendant to the county jail until such fine be paid, is not necessary to confer jurisdiction on the district court to entertain the appeal.—*State ex rel. Hodgdon v. District Court*, 119.

Jurisdiction—Action for Deceit.

4. Section 66 of the Code of Civil Procedure, enacted in pursuance of sections 21 and 22 of Article VIII, of the Constitution, does not clothe justices of the peace, either expressly or impliedly, with power to try and determine actions for deceit.—*State ex rel. Mathews v. Taylor*, 212.

Ejectment—Jurisdiction—Certifying Case to District Court—*Mandamus*.

5. A complaint filed in a justice of the peace court, if stating a cause of action in ejectment, does not give the justice jurisdiction for any purpose, so that he cannot confer jurisdiction on the district court by certifying the case to it; and the latter court cannot be compelled by *mandamus* to hear and determine it.—*State ex rel. Lott v. District Court et al.*, 356.

Unlawful Detainer—Certifying Case to District Court—*Mandamus*.

6. If the question of title to real estate may be raised in an action in unlawful detainer, a justice of the peace cannot certify the cause to the district court without the bond required by Code of Civil Procedure, section 1486, having been filed, and where no such bond was furnished, the district court cannot be compelled by *mandamus* to hear and determine the cause.—*State ex rel. Lott v. District Court et al.*, 356.

Unlawful Detainer—Certifying Case to District Court—*Mandamus*.

7. If the question of title may not be raised in an action in unlawful detainer, all allegations respecting it in the pleadings are surplusage, and the justice of the peace court has jurisdiction to hear the cause, of which jurisdiction it cannot divest itself by certifying

the cause to the district court (Code of Civil Procedure, section 1486); and *mandamus* will not lie to compel the latter court to hear and determine the case so certified to it.—*State ex rel. Lott v. District Court et al.*, 356.

LACHES.

Probate Courts—Real Estate—Order of Sale.

1. *Quære*: May district courts, when sitting in probate, deny an order for the sale of real estate, where it appears that there has been such unreasonable delay in making the application as to amount to laches?—In *re Tuohy's Estate*, 230.

Probate Proceedings—Real Estate—Order of Sale.

2. Where it appeared, on an application to the probate court for an order of sale of real estate, that the estate had been involved in litigation until about a year before the application, and that appellants, who objected to the granting of the order, desiring that the property belonging to the estate and particularly that portion devised to them should not be sold, had encouraged the executor to make leases of mining claims belonging to the estate, a finding by the court that under all the circumstances there had been no unreasonable delay on the part of the executor in making the application was justified—assuming that the defense of laches could be invoked to defeat the application.—In *re Tuohy's Estate*, 230.

LEASES.

See *School Lands*.

LIENS.

See *Mechanics' Liens*.

LIMITATIONS.

Escheated Estates—Recovery—Statutory Construction.

1. Under the provisions of Political Code, section 5162, the limitation of twenty years prescribed by Code of Civil Procedure, section 2253, within which to file petition in the district court to determine one's heirship to escheated property, is exclusive and the limitation periods prescribed for ordinary actions have no application to such a proceeding.—In *re Pomeroy*, 69.

Probate Proceedings—Claims Against Estate.

2. When claims have been presented and allowed and are not contestable because not presented in time (Code of Civil Procedure section 2603), or because barred at the time of the presentation (*Id.*, section 2609), the statutory limitations do not run against them.—In *re Tuohy's Estate*, 230.

LIVE STOCK.

See, also, *Municipal Corporations*, 3, 4; *Contracts*, 7; *Claim and Delivery*, 7.

Where Assessable.

1. *Held*, that where a corporation, engaged in the live stock business, grazed its cattle in T. county, in which county the corporate headquarters were maintained, where its real estate was situate, and where its business manager and foreman resided, caused a large number of its live stock to be driven into L. & C. county to be winter-fed, with the intention of having it returned to the former county in the following spring, the *situs* of such live stock for the purposes

of taxation—its home—was in the former county, and not in the latter—its temporary abode.—*Flowerree Cattle Co. v. Lewis & Clark County*, 32.

Assessment—Statutes—Amendment—Repeal.

2. Under the provisions of section 5163 Political Code, section 3720 of the same Code, relating to the assessment of live stock, was not repealed by section 3943 as amended (Laws 1903, p. 225), the former section being part of Chapter III, Title X, treating of assessment of property generally, and the latter, part of Chapter IX, of the same Title, having to do with the collection of taxes on certain personal property.—*Flowerree Cattle Co. v. Lewis & Clark County*, 32.

Railroads—Killing of—Complaint.

3. A complaint in an action for the killing of live stock by a railroad company, brought under section 2680, Revised Statutes of Idaho, which failed to allege that at the time of the killing the defendant company was operating a line of railroad within that state, but stated that the defendant "is a corporation" and "is the owner, controller and operator" of a railroad—which allegations are referable to the time the complaint was verified and filed, and not to the date on which the stock was killed—failed to state a cause of action.—*McKnight v. Oregon Short Line R. Co.*, 40.

Trial—Opening Statement—Grounds of Recovery—Waiver.

4. Where, in an action against a railroad company for killing live stock, plaintiff's counsel at the opening of the trial stated to the court that he relied on the cause of action set out in his complaint, relative to a defective fence, he thereby waived any other ground for recovery mentioned in the complaint.—*Metlen v. Oregon Short Line R. Co.*, 45.

Railroad—Killing of—Fences—Complaint.

5. A complaint in an action against a railroad company for the killing of live stock, which fails to allege plaintiff's ownership or possession of the land along or through which the railroad runs at the point where the animals were killed, fails to state facts sufficient to constitute a cause of action. (*Beaudin v. Oregon Short Line R. Co.*, 31 Mont. 238, 78 Pac. 303.)—*Metlen v. Oregon Short Line R. Co.*, 45.

Killing by Railroads—Evidence—*Res Gestae*.

6. In an action against a railroad company for the killing of live stock, brought under section 951 of the Civil Code, the testimony of a witness that the section boss showed him where the animal was when struck, and stated that after it was struck he killed it to end its sufferings, was not admissible as *res gestae*.—*Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co.*, 338.

Killing by Railroads—Evidence—Motion to Strike.

7. Where, in an action against a railroad company for the killing of live stock, a witness was permitted, without objection, to testify to certain declarations of a section boss who witnessed the accident, and counsel for defendant thereupon cross-examined the witness, notwithstanding the evidence was clearly hearsay, and then for the first time moved to have it stricken out, the effort to exclude it came too late, and the district court properly denied the motion.—*Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co.*, 338.

Killing by Railroads—Pleadings—Proof.

8. *Held*, in an action against a railroad company to recover for the killing of live stock, under Civil Code, section 951, that proof of an

injury to an animal which would inevitably result in its death, substantially supports an allegation of killing.—*Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co.*, 338.

Killing by Railroads—Complaint—Proof—Variance.

9. The complaint in an action against a railroad company to recover for cattle killed by it, under section 951 of the Civil Code, alleged that the company so negligently managed its locomotive and cars as to kill the animal in question. The proof showed that while the animal had been fatally injured, it was actually killed by a section boss in defendant's employ, to end its sufferings. *Held*, that the defendant not having been misled by the variance, and substantial justice having been done between the parties (Code Civ. Proc., secs. 770, 778), the judgment will not be reversed because of the variance.—*Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co.*, 338.

Killing by Railroads—Negligence—Instructions.

10. An instruction given in an action, brought under section 951 of the Civil Code, against a railroad company, for the killing of live stock, to the effect that the law presumed such killing to have been the result of defendant's negligence, correctly stated the law, even though it appeared that while the animal was fatally injured by the locomotive and cars of the defendant, the actual killing was done by one of defendant's employees to end its sufferings. [Mr. Justice Milburn dissenting.—*Poindexter & Orr. Live Stock Co. v. Oregon Short Line R. Co.*, 338.

MANDAMUS.

Telephone Companies—Municipal Corporations—Use of Streets.

1. A telephone company, having the absolute right to use the streets of a city for the erection of its poles and construction of its lines, subject only to such reasonable regulations by the city as to *where in the streets* the poles and other appliances should be placed, cannot compel the city by *mandamus* to designate the streets, avenues and alleys upon which to place its necessary appliances.—*State ex rel. Rocky Mt. B. Tel. Co. v. Mayor etc. of Red Lodge*, 345.

Justice of the Peace—Ejectment—Jurisdiction—Certifying Case to District Court.

2. A complaint filed in a justice of the peace court, if stating a cause of action in ejectment, does not give the justice jurisdiction for any purpose, so that he cannot confer jurisdiction on the district court by certifying the case to it; and the latter court cannot be compelled by *mandamus* to hear and determine it.—*State ex rel. Lott v. District Court et al.*, 356.

Unlawful Detainer—Certifying Case to District Court.

3. If the question of title to real estate may be raised in an action in unlawful detainer, a justice of the peace cannot certify the cause to the district court without the bond required by Code of Civil Procedure, section 1486, having been filed, and where no such bond was furnished, the district court cannot be compelled by *mandamus* to hear and determine the cause.—*State ex rel. Lott v. District Court et al.*, 356.

Unlawful Detainer—Certifying Case to District Court.

4. If the question of title may not be raised in an action in unlawful detainer, all allegations respecting it in the pleadings are surplusage, and the justice of the peace court has jurisdiction to hear the cause, of which jurisdiction it cannot divest itself by certifying the cause to the district court (Code of Civil Procedure, section 1486); and *mandamus* will not lie to compel the latter court to hear and determine the case so certified to it.—*State ex rel. Lott v. District Court et al.*, 356.

MARRIED WOMEN.

See Husband and Wife.

MEASURE OF DAMAGES.

See Damages.

MECHANICS' LIENS.

Verification—Insufficiency.

1. A verification, attached to a mechanic's lien (section 2131, Code of Civil Procedure, as amended by Laws 1901, p. 162), and executed by the president of a corporation in its behalf, stating "that the matters and things therein stated are true, *to the best of his knowledge, information and belief*," is not an affidavit and therefore insufficient for the purpose intended.—*Western Plumbing Co. v. Fried*, 7.

Invalid—Personal Judgment.

2. A party seeking to foreclose a mechanic's lien may have a personal judgment in the same action against the person liable for the materials furnished and the work and labor done, though he fails to establish his lien.—*Western Plumbing Co. v. Fried*, 7.

MILEAGE.

See Sheriffs, 3; Witnesses, 5.

MINES AND MINING.

Action to Quiet Title—Ore Bodies—Jury Trial.

1. In an action brought for the purpose of quieting title to ore bodies, the parties are not entitled, as a matter of right, to a trial by jury.—*Hickey et al. v. Anaconda Copper M. Co. et al.*, 46.

Appeal—Review of Evidence—Record—Exhibits.

2. While ore samples introduced as exhibits in the trial of a case may be brought to the supreme court as original exhibits, under the rules of that court, yet they are not required to be taken up as a part of the evidence in the case on review.—*Hickey et al. v. Anaconda Copper M. Co. et al.*, 46.

Extralateral Rights—Discovery Shaft—Location—Cross-examination.

3. In an action to determine extralateral rights, one of the questions in controversy was whether the discovery vein extended lengthwise of the claim, intersecting its end lines, or whether it extended diagonally across the claim through both of its side lines. One of the locators, on direct examination, testified that he and his associates had discovered a vein within the surface lines of the claim, had sunk a discovery shaft thereon, and could trace the vein in an easterly and westerly direction. On cross-examination he further stated that a second shaft was sunk on the claim in a northwesterly direction from the discovery shaft. An objection was sustained to the further question whether this second shaft was sunk on the discovery vein. *Held*, that the statements of the witness on direct examination authorized his cross-examination relative to the location of the discovery shaft, the course or strike of the discovery vein, the location and character of the assessment work done on the claim which might have thrown light on the issue of the course of the vein, and whether, as a fact, the discovery shaft was actually sunk on the vein.—*Hickey et al. v. Anaconda Copper M. Co. et al.*, 46.

Expert Witnesses—Prospectors.

4. A question asked of a locator of a mining claim, in an action to quiet title to ore bodies, whether a certain shaft had been sunk on the discovery vein, did not call for expert or opinion testimony, so as to bring the witness within a stipulation by which each side agreed to confine itself to a certain number of geological and expert witnesses.—*Hickey et al. v. Anaconda Copper M. Co. et al.*, 46.

Location—Patents—Evidence—Findings.

5. In an action to determine extralateral mining rights, evidence held insufficient to support a finding that the location of plaintiff's claim was prior to the location of either the O. or N. claims, and that the patent to plaintiff's claim was issued prior to the patents to such other claims.—*Hickey et al. v. Anaconda Copper M. Co. et al.*, 46.

Declaratory Statement—Verification—Statutes—Constitutionality.

6. The Act of 1873 (Laws Extra. Session, 1873, p. 83) declaring that any person who shall discover any mining claim upon any vein or lode bearing gold, silver, etc., shall, within twenty days thereafter, make and file for record in the recorder's office of the county in which the discovery is made a declaratory statement thereof in writing, on oath, describing such claim in the manner provided by the laws of the United States, etc., was not unconstitutional, as in conflict with United States Revised Statutes, section 2324 (U. S. Comp. Stats. 1901, p. 1426), which does not require the notice or declaratory statement to be verified.—*Hickey et al. v. Anaconda Copper M. Co. et al.*, 46.

Declaratory Statement—Insufficiency.

7. Held, under Act of 1873 (Laws Extra. Session, 1873, p. 83) requiring declaratory statements to be verified on oath of the locator, recorded, etc., "in the manner provided by the laws of the United States" (Rev. Stats., sec. 2324), that a verification reciting that the subscribers, who, being first duly sworn, on oath said, each for himself, that he was of lawful age, a citizen of the United States and that the foregoing notice by them subscribed was a true copy of the original notice of location of the claim "above described, as posted thereon on the day therein stated," was fatally defective.—*Hickey et al. v. Anaconda Copper M. Co. et al.*, 46.

Location—Patent—Doctrine of Relation.

8. The question whether a patent to a mining claim relates back to the date of its location must be determined by the facts of each particular case.—*Hickey et al. v. Anaconda Copper M. Co. et al.*, 46.

Patent—Not Conclusive—Of What Fact.

9. The patent to a mining claim is not conclusive of the fact that a declaratory statement in due form of law was filed for record.—*Hickey et al. v. Anaconda Copper M. Co. et al.*, 46.

Extralateral Rights—Decree.

10. A decree entered in an action to quiet title to certain ore bodies, awarding extralateral rights within planes in fan shape, was erroneous.—*Hickey et al. v. Anaconda Copper M. Co. et al.*, 46.

Adverse Claims—Equity.

11. A suit to determine an adverse claim to mining property is one of equitable cognizance.—*Kirby v. Higgins et al.*, 518.

Adverse Claims—Evidence—Sufficiency—Review.

12. Evidence reviewed in an action to determine an adverse claim to mining property, and held insufficient to support a verdict in favor of plaintiff, in that it wholly failed to identify the ground claimed.—*Kirby v. Higgins et al.*, 518.

Evidence—Adverse Claims—Review—Exhibits—Maps—Record.

13. Where, in a suit to determine an adverse claim to mining property, maps are used in connection with the oral testimony of witnesses, identifying marks should be placed upon the maps, with proper references to such marks in the record, so as to make any allusion to them by the witnesses intelligible to the appellate tribunal in reviewing the evidence.—*Kirby v. Higgins et al.*, 518.

MONOPOLIES.**Anti-Trust Legislation—Constitutional Law.**

1. Section 321 of the Penal Code, prohibiting the formation of combinations or trusts for the purpose of fixing the price or regulating the production of articles of commerce, and prescribing penalties for violations thereof, is, by reason of the provisions of section 325 of the same Code, to the effect that such prohibition shall not apply to persons engaged in agriculture and horticulture, obnoxious to that portion of the Fourteenth Amendment to the federal constitution which declares that "no state shall deny to any person within its jurisdiction the equal protection of the laws," and both sections, being dependent upon each other, are therefore void.—*State v. Cudahy Packing Co. et al.*, 179.

MORTGAGES.**Foreclosure—Adjustment of Equities.**

1. (On rehearing.) Where defendant and plaintiff's assignor had an accounting of all dealings between them, and defendant executed notes and a mortgage to secure the balance found due from him to his assignor, and it appeared, in a suit brought by plaintiff to foreclose the mortgage, that his assignor had held the record title to a separate tract of land not covered by the mortgage, in order to secure a sum which was afterward included in the accounting, and had agreed to convey such separate tract to defendant, but had not released such tract from its position as security, the court, in decreeing foreclosure, should adjust all equities arising out of the transaction, and require plaintiff, who had succeeded to his assignor's title to the separate tract, to convey such tract to defendant, on the payment by defendant of the sum which the separate tract was held to secure, or so much thereof as remained unpaid after foreclosure and settlement of the mortgage, together with interest, taxes, and assessments on such tract.—*Keely v. Gregg et al.*, 216.

Chattel—Renewal—Affidavits—Statutes.

2. The statute relative to the renewal and extension of a chattel mortgage by means of an affidavit executed and filed by the mortgagee (Civil Code, section 3866) must be strictly followed in order to acquire any right under it.—*Rosenbaum Bros. & Co. v. Ryan Bros. Cattle Co.*, 424.

Sufficiency of Affidavit of Renewal.

3. *Quære*: Is an affidavit of renewal of a chattel mortgage sufficient which alleges (with respect to the provision of the Civil Code, section 3866, that it must state the amount of the debt justly owing, at the time of the filing of the affidavit or the conditions of the obligation unfulfilled), that the promissory notes and interest thereon are wholly unpaid, and which fails to state the time to which the mortgage is extended, but only the time to which the payment of the debt is extended.—*Rosenbaum Bros. & Co. v. Ryan Bros. Cattle Co.*, 424.

Liens—Statutory Construction.

4. *Held*, under Civil Code, sections 3865, 3866 and 3867, that the time fixed in an affidavit of renewal of a chattel mortgage marks the utmost limit of the life of the mortgage lien as against attaching creditors of the mortgagor, and the sixty days of grace mentioned in section 3865 have reference only to such period of time from the maturity of the debt as fixed at the execution of the mortgage, and not to any such period after the maturity of the debt as fixed by some subsequent agreement of the parties to the mortgage.—*Rosenbaum Bros. & Co. v. Ryan Bros. Cattle Co.*, 424.

MUNICIPAL CORPORATIONS.**Cities—Special Improvements—Taxation—Levy—When Void.**

1. Taxes levied by a city for special improvement purposes are absolutely void, where the city council proceeds to create an improvement district, notwithstanding owners representing more than one-half of the area of the property to be assessed to defray the cost of such improvement, appear before it and object to the final adoption of the resolution creating the district for the purpose indicated.—*Hensley v. City of Butte et al.*, 206.

Cities—Special Improvements—Taxation—Void Levy—Remedies.

2. Where a tax levied by a city for special improvement purposes was manifestly void under all circumstances and not merely "irregularly levied or demanded," the remedy provided by Political Code, sections 4024-4026, is not exclusive, but the aid of a court of equity by way of injunction may be invoked to restrain the collection of such tax.—*Hensley v. City of Butte et al.*, 206.

Cities and Towns—Domestic Animals Running at Large—Ordinances—Application to Range Stock.

3. A city ordinance which makes it unlawful for persons who own or keep certain domestic animals within the city limits, to permit such animals to run at large, has no application to range stock which may stray within the city limits.—*City of Red Lodge v. Maryott*, 299.

City Ordinances—Construction—Live Stock Running at Large.

4. Section 1 of a city ordinance made it the duty of persons owning or keeping certain domestic animals within the city limits to provide for keeping them within or upon their premises, and to prevent them from running at large. Section 2 of the ordinance provided for the impounding of *any domestic animals* found running at large within the corporate limits of the city. *Held*, that these two sections must be construed together, and the meaning of the term "*any domestic animals*" determined by reference to section 1, which enumerates the particular kinds of domestic animals which are prohibited from running at large.—*City of Red Lodge v. Maryott*, 299.

City Ordinances—Construction.

5. Ordinances must be construed as a whole, every portion of them given meaning, if possible, and neither the whole nor any portion rendered ridiculous unless that result is unavoidable.—*City of Red Lodge v. Maryott*, 299.

Telephone Companies—Use of Streets—Mandamus.

6. A telephone company, having the absolute right to use the streets of a city for the erection of its poles and construction of its lines, subject only to such reasonable regulations by the city as to *where in the streets* the poles and other appliances should be placed, cannot compel

the city by *mandamus* to designate the streets, avenues and alleys upon which to place its necessary appliances.—State ex rel. Rocky Mt. B. Tel. Co. v. Mayor etc. of Red Lodge, 345.

NEGLIGENCE.

See Personal Injuries.

NEGOTIABLE INSTRUMENTS.

Promissory Notes—Want of Consideration—Forbearance to Sue—Demurrer.

1. A general demurrer to an answer in an action on a promissory note was improperly sustained, where the answer disclosed that the appealing defendant signed the note long after its execution and delivery by her codefendant, that she was not liable upon his debts represented by the note, and that she signed it only on condition that action should not be brought against her on the paper until the happening of certain contingencies; since, in order that forbearance to sue may constitute a valid consideration for a contract, the party forbearing to sue must have, as against the party to whom the favor is granted, a *bona fide* claim which might give rise to an action to enforce it.—Bank of Ontario v. Hoskins et al., 306.

Indorsee in Due Course—Instructions.

2. An instruction given in an action on negotiable paper, which told the jury that, where the holder took the paper under suspicious circumstances sufficient to put a reasonably prudent man upon inquiry, notwithstanding he had paid value for it, he could not recover, was erroneous, his ability to recover being dependent under section 4035, Civil Code, not upon the nonexistence of suspicious circumstances, but upon his good faith when he obtained possession of the paper as an indorsee in due course.—Harrington v. Butte & Boston M. Co. et al., 330.

Evidence—Bad Faith—Instructions.

3. An instruction which told the jury, in an action to recover on negotiable paper, that if there were any suspicious circumstances attending the purchase of the check in question, the holder was guilty of bad faith, and therefore could not recover, was erroneous, inasmuch as it was for the jury to determine from the evidence relating to the circumstances surrounding the transaction, whether such evidence in fact proved bad faith.—Harrington v. Butte & Boston M. Co. et al., 330.

NEW TRIAL.

Appeal—Review of Evidence—Assignments of Error—Briefs.

1. On appeal from a decree and an order denying a motion for a new trial, in an action to quiet title to ore bodies, the supreme court may review the evidence to determine whether or not it supports the findings and decree, although the order of the trial court denying the motion for a new trial is not specified as error in appellant's brief.—Hickey et al. v. Anaconda Copper M. Co. et al., 46.

Insufficiency of Evidence—Appeal.

2. The supreme court will not ordinarily determine whether the evidence is insufficient to sustain the verdict, when a new trial is ordered for errors committed during the trial.—Doll v. Hennessey Mercantile Co., 80.

Joint Motion—Insufficiency of Evidence—Assignment of Error as to One Defendant.

3. In an action against joint defendants for goods sold and delivered, where the issue of fact was whether the person who pur-

chased the goods was authorized to do so as agent for defendants, an assignment of error that the evidence was insufficient to sustain the verdict as to one defendant did not call for a new trial as to both defendants, and a joint motion for a new trial, so far as based on such assignment, was properly overruled.—*Capital Lumber Co. v. Barth et al.*, 94.

District Judges—Disqualification—Bias and Prejudice—Motion—Contempt.

4. The affidavit imputing bias and prejudice on the part of the district judge, provided for in section 180 of the Code of Civil Procedure, as amended by Act of 1903 (Laws of 1903, 2d Extra. Session, p. 9), may be filed by attorney or client, after a trial has been had and while a motion for a new trial is pending, at any time before the day set for the hearing of such motion; and the filing thereof does not constitute contempt.—*State ex rel. Carleton v. District Court et al.*, 138.

Statement—Preparation and Service—District Courts.

5. Where, by stipulation of counsel, the time for the preparation and service of a statement on motion for a new trial had been extended for ninety days, the district court had power to grant a further extension, without the consent of the adverse party and upon good cause shown, within the limit of ninety days prescribed by Code of Civil Procedure, section 1897, as amended by Session Laws, 1903, page 38, and service made during the time so granted by the court was timely.—*Nord v. Boston & Mont. C. C. & S. M. Co.*, 464.

Statement—Constructive Service—When Insufficient.

6. Constructive service of a statement on motion for a new trial, by delivery thereof to a person who, although at one time a stenographer in the office of the attorney upon whom service was attempted to be made, was not then in his office or in charge of it but employed elsewhere, was insufficient.—*Nord v. Boston & Mont. C. C. & S. M. Co.*, 464.

Statement—Service—Principal and Agent—Ratification.

7. An attorney attempting service of a statement on motion for a new trial upon opposing counsel by delivery thereof to a person who, although at one time in the latter's employ in a clerical capacity, was then employed elsewhere, but assumed to act for him notwithstanding, is charged with the duty of ascertaining that person's authority for accepting service, and lack of notice of the clerk's discharge is of no moment.—*Nord v. Boston & Mont. C. C. & S. M. Co.*, 464.

Statement—Service—Ratification.

8. Where constructive service of a statement on motion for a new trial was attempted to be made by delivery of a copy thereof to a former clerk of the attorney to be served, who assumed to act for her former employer in accepting service and entering into a stipulation for an extension of time in which to file objections thereto, the silence of the attorney, upon being asked whether he would repudiate the action of the clerk, cannot be construed to have been a ratification of the clerk's acts.—*Nord v. Boston & Mont. C. C. & S. M. Co.*, 464.

Statement—Service—Clerk—Ratification.

9. An attorney by securing an order of court extending the time within which to propose amendments to a statement on motion for a new trial, without relying upon a stipulation for an extension of time entered into by a former clerk when no longer in his employ, did not thereby certify the clerk's action in accepting service of the statement at the same time, especially when the order was made with a reservation of all his rights to object to the settlement of the state-

ment and to the granting of a new trial on the ground of insufficiency of the service.—*Nord v. Boston & Mont. C. C. & S. M. Co.*, 464.

Statement—Service—Waiver—Burden of Proof.

10. The burden of proving a waiver of insufficient service of a statement on motion for a new trial rests upon him who alleges it, and the proof must be clear and satisfactory.—*Nord v. Boston & Mont. C. C. & S. M. Co.*, 464.

Statement—Service—Waiver—Objection to Settlement.

11. An attorney who at each step taken in the settlement of a statement on motion for a new trial preserved his right to object to its settlement on the ground that legal, timely or sufficient service had not been made, did not waive the failure of service by appearing in court and asking for additional time in which to prepare amendments and thereafter filing same.—*Nord v. Boston & Mont. C. C. & S. M. Co.*, 464.

Statement—Service—Principal and Agent.

12. Where it did not appear that a stenographer in an attorney's office had ever been the agent of her employer for any other purpose than to receive service of papers while in his employ and in his office or in charge of it (Code of Civil Procedure, section 1831), an attorney, in attempting to make service of a statement on motion for a new trial by handing same to such stenographer, then employed elsewhere and located in a different building, did so with full knowledge that she was no longer authorized to accept service of papers for her former employer, and was therefore bound at his peril to ascertain her authority in acting in his behalf. (On Motion for Rehearing.)—*Nord v. Boston & Mont. C. C. & S. M. Co.*, 464.

Statement—Constructive Service—How Made.

13. If constructive service of a paper is sought to be made upon an attorney during his absence from his office, by delivery to his clerk, it must be under Code of Civil Procedure, section 1831, by leaving it with the clerk "therein" (the attorney's office), and not by leaving it with the clerk elsewhere.—*Nord v. Boston & Mont. C. C. & S. M. Co.*, 464.

When Order Granting Motion will be Affirmed.

14. Where the order sustaining a motion for a new trial is general, it will not be disturbed on appeal if it can be sustained upon any ground of the motion.—*Beasley v. Berry et al.*, 477.

NONSUIT.

Ground of Motion too General.

1. A motion for nonsuit upon the ground "that the plaintiff has failed to make out a case" was too general to merit consideration at the hands of the district court.—*Mackel v. Bartlett*, 123.

Appeal—Review—Scope.

2. On appeal from an order of nonsuit, the sufficiency of the complaint will not be considered, where it was not made a ground of the motion as submitted to the trial court.—*Mackel v. Bartlett*, 123.

Variance—Failure to Object to Testimony.

3. Defendant is not precluded from moving for a nonsuit upon the ground of a fatal variance between the allegations of the complaint and the proof, by his failure to object to the introduction of testimony by plaintiff.—*Kalispell Liquor & Tobacco Co. v. McGovern et al.*, 394.

NORMAL SCHOOL LANDS.

See School Lands.

NOTICE.

See, also, Costs 13, 14, 16.

Criminal Law—Justices' Courts—Appeals—County Attorneys.

1. Failure to serve notice upon the county attorney of an appeal to the district court from a judgment of conviction had in a justice court is not ground for the dismissal of the appeal.—State ex rel. Hodgdn v. District Court, 119.

OFFICERS.

See Sheriffs.

ORDINANCES.

See Municipal Corporations, 3, 4, 5.

PARTIES.

Partnership—Sale of Entire Stock by One Partner—Action Against Purchaser.

1. Where one partner sold the entire stock in trade of a partnership to a stranger without the consent of his copartner, in violation of Civil Code, section 3232, subsection 3, it was not necessary that the nonassenting member of the firm make the wrongdoing partner a party plaintiff in an action against the purchaser for the value of the complaining partner's interest in the property sold.—Doll v. Hennessy Mercantile Co., 80.

Joint—Contracts—Actions.

2. In an action brought by B. and wife for breach of an agreement to pay to them jointly a certain sum of money, the promisees are necessary parties plaintiff and their action can be joint only.—Brown et al. v. Daly, 523.

Executors and Administrators—Claims Against Estate—Presentation—Actions.

3. Under Code of Civil Procedure, sections 2606, 2608 and 2610, a claim against an estate must first be presented to the executor or administrator for allowance or rejection before action can be brought to enforce such claim. B. and wife, in an action against the executrix of an estate for the breach of an agreement, entered into with them by decedent, to pay to them jointly a certain sum of money, alleged that each had presented to the executrix a separate claim for half the amount sued for and that the claims had been rejected: *Held*, that plaintiffs, never having presented a joint claim against the estate, could not maintain a joint action based upon the presentation and rejection of their separate claims.—Brown et al. v. Daly, 523.

PARTNERSHIP.

Actions in Firm Name.

1. An action may not be brought in a copartnership or firm name, section 590 of the Code of Civil Procedure, which provides that where persons, associated in business, transact such business under a common name, they may be sued by such common name, having no application to parties plaintiff.—Doll v. Hennessy Mercantile Co., 80.

Rights of Partners—Actions Against Copartners.

2. Since the amount of the firm assets to which a partner is entitled depends on a settlement of the partnership affairs and an adjustment of balances, which can only be determined by a voluntary accounting or by a suit in equity, neither an individual partner, nor a purchaser of his interest, can sue at law to recover such share.—*Doll v. Hennessy Mercantile Co.*, 80.

Sale of Entire Stock by One Partner—Validity—Nonassenting Partner.

3. Under Civil Code, section 3232, subsection 3, a sale of the entire stock in trade of a partnership to a stranger is absolutely void as to the nonassenting partner's interest in the property sold, and both the purchaser and seller may be held liable by the complaining partner for a wrongful conversion of such interest.—*Doll v. Hennessy Mercantile Co.*, 80.

Sale of Entire Stock by One Partner—Action Against Purchaser—Parties.

4. Where one partner sold the entire stock in trade of a partnership to a stranger without the consent of his copartner, in violation of Civil Code, section 3232, subsection 3, it was not necessary that the nonassenting member of the firm make the wrongdoing partner a party plaintiff in an action against the purchaser for the value of the complaining partner's interest in the property sold.—*Doll v. Hennessy Mercantile Co.*, 80.

Same—Conversion—Measure of Damages—Evidence.

5. The measure of damage applicable in an action brought by a partner to recover the value of his interest in the partnership property sold to a stranger by his copartner in violation of Civil Code, section 3232, subsection 3, is that fixed by Civil Code, section 4333, as the reasonable value of the property at the date of the conversion, or the highest market value at any time between the conversion and the verdict; and evidence, offered to show the accounts between the partners and that the firm was in debt, was neither relevant nor material as tending to establish the value of the property sold.—*Doll v. Hennessy Mercantile Co.*, 80.

Same—Proceeds of Sale Applied to Debts of Firm—Invalidity of Sale as Against Nonassenting Partner.

6. Under Civil Code, section 3232, subsection 3, declaring that a partner is without authority to dispose of the whole of the partnership property at once, the invalidity, as against a nonassenting partner, of an attempted sale by one partner of the entire partnership property, is not affected by the fact that the amount received in the purchase was actually expended in liquidating the firm debts and evidence to that effect was properly excluded in an action by a nonassenting partner.—*Doll v. Hennessy Mercantile Co.*, 80.

Same—Ratification by Nonassenting Partner—Knowledge of Circumstances.

7. The ratification by a nonassenting partner of a sale by another partner of the entire partnership property, in violation of Civil Code, section 3232, subsection 3, which action was entirely beyond the scope of his authority, could only be accomplished by his accepting the benefits of such a sale with full knowledge of all the circumstances surrounding it.—*Doll v. Hennessy Mercantile Co.*, 80.

Same—Partnership Agreement—Contents—Oral Evidence.

8. Where, in an action brought by a member of a partnership to recover the value of his interest in the partnership property, sold to a stranger by his copartner in violation of Civil Code, section 3232, subsection 3, some of plaintiff's witnesses were questioned about

the partnership agreement but made no statements as to the contents of the writing, an offer to prove by oral testimony that the wrongdoing partner had authority under its terms to make the sale, was properly rejected, it not having been shown that the writing was lost or destroyed.—*Doll v. Hennessy Mercantile Co.*, 80.

Same—Market Value of Goods Sold—Evidence.

9. The defendant in an action, brought by a nonassenting partner to the sale of the entire stock in trade of a partnership by his copartner in violation of Civil Code, section 3232, subsection 3, may show why a price greater than the market price was paid, and that other considerations than the market value entered into the determination of the price paid for the stock.—*Doll v. Hennessy Mercantile Co.*, 80.

Same—Good Faith of Purchaser.

10. Under Civil Code, section 3232, subsection 3, declaring that a partner has no authority to dispose of the whole of the partnership property at once, the purchaser acquires no title as against a non-assenting partner, regardless of the good faith of the purchaser or his want of knowledge of the complaining partner's interest in the property sold, or of the copartner's wrongdoing.—*Doll v. Hennessy Mercantile Co.*, 80.

Same—Value of Property—Instructions—Jury—Weight of Evidence.

11. An instruction in an action by one partner in a partnership against the purchaser of its entire stock in trade, which had been sold by his copartner in violation of Civil Code, section 3232, subsection 3, that the amount paid for property converted is not controlling as to value, unless it appears from the evidence that the same is the reasonable value, but the recovery should be based on the reasonable value of the property, if it exceeds the amount paid, or, if not, then upon the amount paid, was inconsistent with itself, contradictory in statement, and invaded the province of the jury by stating the weight they should attach to a particular portion of the evidence.—*Doll v. Hennessy Mercantile Co.*, 80.

Sawmills—Individual Liability.

12. One who furnishes logs to others who are running a sawmill in which the former has no interest, does not, by reason of the fact that the sawed lumber is divided between the owners of the sawmill, on the one hand, and himself, on the other, sustain such a relation to the owners of the sawmill as to be liable for any obligation contracted by one of them.—*Michener v. Fransham*, 108.

Employee Sharing Profits.

13. The mere fact that an employee, engaged to buy and handle sheep for his employer, to purchase feed for them and generally to have charge of the latter's business, was to receive one-third of the profits, in addition to a fixed compensation of \$75 per month, did not constitute him a partner, where it appeared that the business was carried on in the employer's name, by whom all funds were furnished, and who had never permitted himself to be held out as a partner with the employee.—*Beasley v. Berry et al.*, 477.

Sharing Profits.

14. While the sharing of profits is some evidence that a partnership exists, it is not conclusive proof of it.—*Beasley v. Berry et al.*, 477.

PATENTS.

Mines—Location—Doctrine of Relation.

1. The question whether a patent to a mining claim relates back to the date of its location must be determined by the facts of each particular case.—*Hickey et al. v. Anaconda Copper M. Co. et al.*, 46.

Not Conclusive—Of What Fact.

2. The patent to a mining claim is not conclusive of the fact that a declaratory statement in due form of law was filed for record.—*Hickey et al. v. Anaconda Copper M. Co. et al.*, 46.

Mines—Doctrine of Relation.

3. Where the declaratory statement, filed in support of a mining location was void, the patent subsequently issued did not, by relation, give validity to the location at a date antecedent to the application for the patent.—*Hickey et al. v. Anaconda Copper M. Co. et al.*, 46.

PERSONAL INJURIES.

Electricity—Pleadings—Answer—Negative Pregnant.

1. The answer to a complaint, in an action for personal injuries against an electric light and power company, charging that defendants on a certain day hung the wire with which plaintiff came in contact over and across a trestle, which denied that any of the defendants, except one, so hung the wire, and that any of the defendants hung such wire only three feet or about three feet above the trestle, but alleged that a certain wire had been strung across it by one of the defendants a distance of about four and a half feet from said trestle, contained a negative pregnant and did not raise any issue as to whether the wire was placed in position before or after the erection of the trestle.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Electricity—Trespassers—Instructions.

2. *Held*, in an action for personal injuries alleged to have been received by plaintiff on coming in contact with one of defendant electric light company's wires strung over a trestle upon which plaintiff was working as an employee of a mining company, that in the absence of anything to justify the conclusion that either the owner of the wire or the owner of the trestle was a trespasser as to the other, an instruction imposing on defendants the duty of inspecting their lines of wire was not objectionable on the ground that plaintiff was a trespasser to whom defendants owed no duty of inspection.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Electricity—Duty of Defendant in Handling—Instructions.

3. The district court properly charged the jury in an action for personal injuries sustained by plaintiff while rightfully in pursuit of his occupation, by coming in contact with a wire charged with electricity, which wire had been strung by an electric light company over a trestle used by plaintiff in his work—that persons or corporations who handle a force of great inherent danger to the lives and safety of others, are held by law to a high degree of care in handling it, and that the care required is measured by and equal to the danger.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Electricity—Duty of Defendant to Inspect Plant—Instructions.

4. An instruction given in an action for personal injuries, received by plaintiff through coming in contact with a wire charged with electricity, strung by an electric light and power company over a trestle upon which plaintiff was at work, to the effect that defendant was bound to maintain a system of inspection by which any

change in the physical condition of the plant, poles or lines of wire, which might create or increase danger to human life, could be detected, correctly stated the law.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Electricity—Instructions—Prejudice.

5. In an action for injuries to plaintiff by coming in contact with defendant's live electric wire, overhanging a trestle on which plaintiff was working, an instruction that there was no evidence that defendants had actual notice of the erection of the trestle, and that their wires were in close proximity thereto, and that the jury should only consider this in the event they believed that the wire was hung before the trestle was erected, otherwise defendants were chargeable with knowledge of the existence of the trestle and the physical conditions surrounding it—was not prejudicial to defendant.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Damages—Earning Capacity—Evidence.

6. Evidence as to the wages received by plaintiff, in an action for personal injuries, a year prior to the date of the accident was admissible as bearing on his earning capacity.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Damages—Earning Capacity—Instructions.

7. While an instruction should be given in an action for personal injuries in determining the amount of damages to be awarded for impairment of earning capacity in the future, to the effect that the compensation to be allowed should be such as will purchase an annuity equal to the difference between the annual earnings of plaintiff before the injury and the amount he might earn thereafter, if any, yet where such a charge was not given and the one submitted on this question was not complained of or a more specific one asked, defendants may not be heard to contend that the jury was improperly instructed in this regard.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Damages—Instructions.

8. In an action for personal injuries, an instruction that, if the jury found for plaintiff, in fixing his damages they might consider mental and physical suffering caused by the injury, wages which plaintiff might have earned from the date of the injury to the date of the trial, and, if the injuries were permanent, any loss to him by reason of the impairment of his capacity to earn money in the future, was proper.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Excessive Damages—Appeal—Burden of Showing Error.

9. The burden of showing error on the ground of excessive damages awarded in a personal injury case rests upon appellant, and in the absence of a clear showing the supreme court will not interfere.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Excessive Damages—Appeal.

10. Where, in an action for injuries, the evidence was such that the jury might well have found that plaintiff's injuries were permanent, and that, though he was forty-five years of age, and had previously earned \$3.50 per day, he would not thereafter be able to earn money, a verdict in his favor for \$20,000 will not be set aside on appeal as excessive.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Instructions—Contributory Negligence—Assumption of Risk—Burden of Proof.

11. An instruction, in an action for personal injuries, which told the jury that the burden was upon defendant to show contributory negligence.—*Mont.*, Vol. 33—40

gence and assumption of risk, was not objectionable, where in other paragraphs of the charge they were informed that their verdict should be for defendant in case *either* defense was established by a preponderance of the evidence.—*Nord v. Boston & Mont. C. C. & S. M. Co.*, 464.

Contributory Negligence—Assumption of Risk—Burden of Proof.

12. Except in that class of cases of personal injuries where the complaint shows that the proximate cause of the injury was plaintiff's own act, contributory negligence and assumption of risk are affirmative defenses, and the burden of establishing them by a preponderance of the evidence rests upon the defendant.—*Nord v. Boston & Mont. C. C. & S. M. Co.*, 464.

PLEADING AND PRACTICE.

Forcible Entry—Complaint—Sufficiency—Appeal—Theory of Case.

1. Where the case was tried on the theory that the complaint stated a cause of action for a forcible entry under Code of Civil Procedure, section 2080, without objection by either party, its sufficiency will be determined on this theory on appeal, although it contains some allegations more appropriate to an action of ejectment.—*Spellman v. Rhode*, 21.

Forcible Entry—Complaint—Sufficiency.

2. A complaint alleging that plaintiff was in possession of certain described lands, engaged in cultivating them as a homestead settlement, and that defendant forcibly and without right entered thereon and by force and arms ejected plaintiff therefrom, states a cause of action for a forcible entry under Code of Civil Procedure, section 2080, subdivision 1.—*Spellman v. Rhode*, 21.

Forcible Entry—Proof—Variance.

3. Where, in an action under Code of Civil Procedure, section 2080, subdivision 1, for a forcible entry, the evidence showed a peaceable entry, and a subsequent forcible turning out of plaintiff, which conduct is made a forcible entry by subdivision 2 of said section, the variance was such as to constitute a failure of proof, within section 772 of the same code, providing that when the allegation of the claim to which the proof is directed, is unproved in its general scope and meaning, it shall be regarded as a failure of proof.—*Spellman v. Rhode*, 21.

Judicial Notice—Statutes of Other States.

4. The courts of this state will take judicial notice of such matters only as are enumerated in section 3150 of the Code of Civil Procedure, and the statutes of sister states not being included, a complaint, brought under a statute of Idaho for the killing of cattle by a railroad company, which fails to plead such statute, is therefore fatally defective.—*McKnight v. Oregon Short Line R. Co.*, 40.

Railroads—Killing of Live Stock—Complaint.

5. A complaint in an action for the killing of live stock by a railroad company, brought under section 2680, Revised Statutes of Idaho, which failed to allege that at the time of the killing the defendant company was operating a line of railroad within that state, but stated that the defendant "is a corporation" and "is the owner, controller and operator" of a railroad—which allegations are referable to the time the complaint was verified and filed, and not to the date on which the stock was killed—failed to state a cause of action.—*McKnight v. Oregon Short Line R. Co.*, 40.

Railroads—Killing of Live Stock—Complaint.

6. A complaint, in an action for the killing of live stock by a railroad company, brought under a statute of Idaho (Rev. Stats., sec. 2680), which did not allege that a claim in writing, for the damages suffered by the owner, had been made upon the defendant company, was fatally defective.—*McKnight v. Oregon Short Line R. Co.*, 40.

Railroads—Killing of Stock—Complaint.

7. A complaint, in an action for the killing of live stock by a railroad company, brought under a statute of Idaho (Rev. Stats., sec. 2680), which did not allege that a claim in writing, for the damages suffered by the owner, had been made upon the defendant company, was fatally defective.—*McKnight v. Oregon Short Line R. Co.*, 40.

Trial—Opening Statement—Grounds of Recovery—Waiver.

8. Where, in an action against a railroad company for killing live stock, plaintiff's counsel at the opening of the trial stated to the court that he relied on the cause of action set out in his complaint, relative to a defective fence, he thereby waived any other ground for recovery mentioned in the complaint.—*Metlen v. Oregon Short Line R. Co.*, 45.

Railroads—Killing Live Stock—Complaint.

9. A complaint in an action against a railroad company for the killing of live stock, which fails to allege plaintiff's ownership or possession of the land along or through which the railroad runs at the point where the animals were killed, fails to state facts sufficient to constitute a cause of action. (*Beaudin v. Oregon Short Line R. Co.*, 31 Mont. 238, 78 Pac. 303.)—*Metlen v. Oregon Short Line R. Co.*, 45.

Trial—General Verdicts—Disregard of Findings—Appeal.

10. Where the district court, in an action for debt, entered judgment upon a general verdict, and in doing so, ignored certain special findings which were contradictory and inconsistent, the appellants, for failure to object to the court's action or to move for judgment upon the findings, are precluded from complaining of the inconsistencies in the findings for the first time on appeal.—*Capital Lumber Co. v. Barth et al.*, 94.

Evidence—Estoppel—Admission Without Objection—Submission to Jury.

11. Held, that where evidence of an estoppel, not pleaded, is admitted without objection, it may properly be submitted as if warranted by the pleadings.—*Capital Lumber Co. v. Barth et al.*, 94.

Practice—Appeal—Record—Evidence.

12. When the question raised by appellant has to do with the admissibility of a particular item of evidence which, if not rejected, would have tended to prove the issue, the record need not contain all of the evidence.—*Mackel v. Bartlett*, 123.

Claim and Delivery—Complaint.

13. A complaint in claim and delivery, filed on April 16, 1903, and alleging that on March 21, 1903, plaintiff was the owner of the property, and that on that day it was taken from her possession wrongfully and without her consent by defendant sheriff, is defective, in that it fails to show that plaintiff was the owner or had any right to the possession of the property at the time the action was commenced, and subsequent allegations that she demanded the possession of the property and that defendant still unlawfully withholds and detains it do not by implication supply the omission of the substantive allegation necessary to show the right to recover.—*Chan v. Slater, Sheriff*, 155.

Election Contests—Grounds of Contest—Waiver.

14. Section 2010, Code of Civil Procedure, enumerates, among others, "malconduct on the part of the board of judges," and the reception of "illegal votes," as grounds for which any elector of a county may contest the right of one to hold an office therein to which he has been declared elected. Contestant in his statement of contest alleged malconduct on the part of the judges, in that they received and counted for respondent votes claimed to have been illegally cast at a precinct on an Indian reservation. *Held*, that each of the causes enumerated in section 2010 constitutes a separate cause of contest, each independent of the other, and that, while contestant may join grounds of contest embracing the several causes mentioned, if he does not do so, but elects to proceed upon one particular ground, he must be deemed to have waived any other ground enumerated.—*Coleman v. Kerr*, 198.

Practice—Objection to Introduction of Evidence—Effect.

15. An objection to the introduction of any evidence confesses, for the purposes of the objection, the truth of the allegations of the complaint which are sufficiently pleaded.—*Hensley v. City of Butte et al.*, 206.

Personal Injuries—Electricity—Answer—Negative Pregnant.

16. The answer to a complaint, in an action for personal injuries against an electric light and power company, charging that defendants on a certain day hung the wire with which plaintiff came in contact over and across the trestle, which denied that any of the defendants, except one, so hung the wire, and that any of the defendants hung such wire only three feet or about three feet above the trestle, but alleged that a certain wire had been strung across it by one of the defendants a distance of about four and a half feet from said trestle, contained a negative pregnant and did not raise any issue as to whether the wire was placed in position before or after the erection of the trestle.—*Bourke v. Butte El. & P. Co. et al.*, 267.

Promissory Notes—Want of Consideration—Forbearance to Sue—General Demurrer.

17. A general demurrer to an answer in an action on a promissory note was improperly sustained, where the answer disclosed that the appealing defendant signed the note long after its execution and delivery by her codefendant, that she was not liable upon his debts represented by the note, and that she signed it only on condition that action should not be brought against her on the paper until the happening of certain contingencies; since, in order that forbearance to sue may constitute a valid consideration for a contract, the party forbearing to sue must have, as against the party to whom the favor is granted, a *bona fide* claim which might give rise to an action to enforce it.—*Bank of Ontario v. Hoskins et al.*, 306.

Sales—Action for Price—Complaint—Sufficiency.

18. A complaint in an action for goods sold, which alleges that during a time specified, plaintiff furnished and delivered to defendant certain goods of a specified value, that defendant received the same and used them for his own benefit, and that he has not paid therefor, states no cause of action, its allegations not being inconsistent with a gift.—*Smith et al. v. Perham*, 309.

Trial—Assignment—Evidence—Rejection—Objection.

19. An objection to testimony of an assessment of a claim against an estate which went to any testimony as to the assignment, whereas the purpose of counsel in making the objection was to exclude oral evidence of it for the reason that it had been made in writing, was too broad,

since, by sustaining the objection as made, proof of the assignment would have been impossible; while it would have been proper to limit the effect of the evidence, by reason of the failure of counsel for appellant to so request, he may not complain of the ruling as made.—*Dorais v. Doll et al.*, 314.

Railroads—Killing Live Stock—Evidence—Motion to Strike—Practice.

20. Where in an action against a railroad company for the killing of live stock, a witness was permitted without objection, to testify to certain declarations of a section boss who witnessed the accident, and counsel for plaintiff thereupon cross-examined the witness, notwithstanding the evidence was clearly hearsay, and then for the first time moved to have it stricken out, the effort to exclude it came too late, and the district court properly denied the motion.—*Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co.*, 338.

Railroads—Killing of Live Stock—Proof.

21. *Held*, in an action against a railroad company to recover for the killing of live stock, under Civil Code, section 951, that proof of an injury to an animal which would inevitably result in its death, substantially supports an allegation of killing.—*Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co.*, 338.

Railroads—Killing of Live Stock—Complaint—Proof—Variance.

22. The complaint in an action against a railroad company to recover for cattle killed by it, under section 951 of the Civil Code, alleged that the company so negligently managed its locomotive and cars as to kill the animal in question. The proof showed that while the animal had been fatally injured, it was actually killed by a section boss in defendant's employ, to end its sufferings. *Held*, that the defendant not having been misled by the variance, and substantial justice having been done between the parties (Code Civ. Proc., secs. 770, 778), the judgment will not be reversed because of the variance.—*Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co.*, 338.

Nonsuit—Variance—Failure to Object to Testimony.

23. Defendant is not precluded from moving for a nonsuit upon the ground of a fatal variance between the allegations of the complaint and the proof, by his failure to object to the introduction of testimony by plaintiff.—*Kalispell L. & T. Co. v. McGovern et al.*, 394.

Divorce—Extreme Cruelty—Complaint—Proof.

24. Under Civil Code, section 134, grievous bodily injury or bodily injury dangerous to life are ultimate facts which must be pleaded and proved in order to entitle plaintiff to a divorce on the ground of extreme cruelty.—*Ryan v. Ryan*, 406.

Divorce—Extreme Cruelty—Complaint.

25. A complaint in an action for divorce upon the ground of extreme cruelty, in that defendant struck, beat and choked plaintiff and otherwise brutally treated her, but which omitted to allege that the acts of defendant produced grievous bodily injury or bodily injury dangerous to life (Civil Code, section 134), failed to state a cause of action. [Mr. Justice Milburn, dissenting.].—*Ryan v. Ryan*, 406.

Divorce—Alimony—Complaint.

26. In order to entitle plaintiff, in an action for divorce, to alimony, the complaint should set forth her necessity therefor and defendant's ability to pay it.—*Ryan v. Ryan*, 406.

Complaint—Insufficiency—Amendments—Appeal.

27. Where a complaint fails to state a cause of action, and it is apparent that it cannot be amended to do so, the judgment of the trial court in favor of defendant, alleged to be erroneous for other reasons, will not be reversed.—*Brown et al. v. Daly*, 523.

PLEDGES.

Accounting—Conversion—Election—Waiver of Tort.

1. Where a pledgor demanded an accounting by the pledgee, not only of the proceeds derived from the use of the property pledged, but also for the price realized from a wrongful sale thereof, and thereafter sued to recover such sums, he thereby waived the pledgee's tort in converting the property.—*Demars v. Hudon*, 170.

Accounting—Equity—Trial by Jury.

2. A suit brought by a pledgor to compel the pledgee to render an accounting of the proceeds derived from the use of the property pledged, and to recover the price realized from a wrongful sale thereof, is an action for an accounting cognizable in a court of equity, in which the defendant is not entitled to a jury trial.—*Demars v. Hudon*, 170.

Conversion—Extent of Liability of Pledgee.

3. Where a pledgee converted the property pledged by selling the same on credit for \$2,500, without interest, taking the purchaser's secured note, which he surrendered on payment of \$2,050, the pledgor on waiving the tort, was entitled to recover the full sale price, and was not limited to the amount which the pledgee had actually received from the purchaser.—*Demars v. Hudon*, 170.

Conversion—Accounting—Interest.

4. Where a pledgee of certain property sold the same on credit, without interest, the pledgor, on ratifying the sale and suing the pledgee for an accounting, was chargeable with interest on the loan secured by the pledge at the agreed rate to the date at which defendant received payment for the property sold sufficient to discharge the indebtedness, and not merely to the date of the sale.—*Demars v. Hudon*, 170.

POSTOFFICE MONEY ORDERS.

Transfer—Title of Transferee.

1. Section 4037, United States Revised Statutes, provides that more than one indorsement of a money order shall render the same invalid. Defendant was the indorsee of a money order which he sent by an agent to the postoffice on which it was drawn in order to get it cashed. The agent sold the order to plaintiff, indorsing it with his own name. *Held*, that plaintiff obtained no title to the order.—*Moore v. Skyles*, 135.

PRESUMPTIONS.

Instructions—Prejudicial Error.

1. Prejudice will be presumed from the giving of an erroneous instruction, even if others were given which correctly state the law.—*Smith et al. v. Perham*, 309.

Personal Property—Sales—Husband and Wife.

2. *Quære*: Is section 4491 of the Civil Code, relative to transfers of personal property, conclusively presumed to be fraudulent, applicable to transfers between husband and wife?—*Webster v. Sherman*, 448.

Claim and Delivery—Crops—Ownership—Instructions.

3. Where, in an action in claim and delivery, it appeared that certain hay grown upon plaintiff's land had been seeded and harvested by her husband under an arrangement between them, an instruction to the effect that ownership of the land carries with it a *prima facie* presumption of ownership of the crops grown upon it correctly stated the law.—*Webster v. Sherman*, 448.

Election Contests—Citizenship.

4. The presumption will be indulged that the father of contestee in an election contest in which the nativity of the latter was at issue, was a citizen of the United States, where it was found that the former at the time of contestee's birth resided in a city within this country.—*Buckley v. McDonald*, 483.

Election Contests—Citizenship—United States Merchant Marine Service.

5. Where, in an election contest in which the contestee's citizenship at the time of his election was in question, it was found that his father had been a captain in the merchant marine service of the United States, it must be presumed that the latter was a citizen of the United States, since under the Revised Statutes of the United States, section 4131, only citizens could act as officers of vessels engaged in the commerce of the United States.—*Buckley v. McDonald*, 483.

PRINCIPAL AND AGENT.

Special Agents.

1. One to whom a money order was given by another, with instructions to see if it was all right, and, if so, to get it cashed, was a special agent of the latter, within the meaning of Civil Code, section 3072.—*Moore v. Skyles*, 135.

Scope of Authority of Agent—Duty of Ascertaining.

2. All persons dealing with an agent are bound to ascertain the scope of the agent's authority, and if they do not, they deal with him at their peril.—*Moore v. Skyles*, 135.

Postoffice Money Orders—Transfer—Title of Transferee.

3. Section 4037, United States Revised Statutes, provides that more than one indorsement of a money order shall render the same invalid. Defendant was the indorsee of a money order which he sent by an agent to the postoffice on which it was drawn in order to get it cashed. The agent sold the order to plaintiff, indorsing it with his own name. *Held*, that plaintiff obtained no title to the order.—*Moore v. Skyles*, 135.

New Trial—Statement—Service—Ratification.

4. An attorney attempting service of a statement on motion for a new trial upon opposing counsel by delivery thereof to a person who, although at one time in the latter's employ in a clerical capacity, was then employed elsewhere but assumed to act for him notwithstanding, is charged with the duty of ascertaining that person's authority for accepting service, and lack of notice of the clerk's discharge is of no moment.—*Nord v. Boston & Mont. C. C. & S. M. Co.*, 464.

New Trial—Statement—Service—Ratification.

5. Where constructive service of a statement on motion for a new trial was attempted to be made by delivery of a copy thereof to a former clerk of the attorney to be served, who assumed to act for her former employer in accepting service and entering into a stipulation for an extension of time in which to file objections thereto, the silence of the attorney, upon being asked whether he would repudiate the action of the clerk, cannot be construed to have been a ratification of the clerk's acts.—*Nord v. Boston & Mont. C. C. & S. M. Co.*, 464.

New Trial—Statement—Service—Attorneys—Clerks.

6. Where it did not appear that a stenographer in an attorney's office had ever been the agent of her employer for any other purpose than to receive service of papers while in his employ and in his office or in charge of it (Code of Civil Procedure, section 1831), an attorney, in attempting to make service of a statement on motion for a new

trial by handing same to such stenographer, then employed elsewhere and located in a different building, did so with full knowledge that she was no longer authorized to accept service of papers for her former employer, and was therefore bound at his peril to ascertain her authority in acting in his behalf.—*Nord v. Boston & Mont. C. C. & Mont. C. C. & S. M. Co.*, 464.

PRIVILEGED COMMUNICATIONS.

Attorney and Client.

1. Information obtained by an attorney from the defendant, in an action brought by a trustee in bankruptcy to recover the amount of an alleged preference, who, while introducing to the attorney the person who made the preference and who was then in search of legal advice, made certain statements in relation to the business affairs of the person so introduced, is not privileged, since the relation of attorney and client did not exist between the defendant and the legal adviser at the time the statements were made; and the supreme court upon review is not bound to accept the assertion of the attorney that "*they* called upon me for the purpose of obtaining my services as an attorney at law" as conclusive.—*Mackel v. Bartlett*, 123.

PROBATE PROCEEDINGS.

See, also, Administrators.

Real Estate—Order of Sale—Jury Trial—Written Demand.

1. Where no written demand for a trial by jury had ever been filed (Code of Civil Procedure, sections 2340, 2923, 2940) by appellants, against whose objections an order, directing the sale of certain real estate, was made by the district court sitting in probate, a jury trial of the issues presented was properly denied; and a demand at the close of the written objections for a jury, which demand was not called to the attention of the court or judge until the hearing began, did not supply the omission.—*In re Tuohy's Estate*, 230.

District Courts—Jurisdiction.

2. The district court sitting as a court of probate has only such powers as are expressly conferred upon it by statute, and such as are necessarily implied in order to carry out those expressly conferred.—*In re Tuohy's Estate*, 230.

District Courts—Probate Jurisdiction—Real Estate—Order of Sale—Title.

3. The district court when sitting in probate, on an application for an order of sale of real estate, made under section 2671 of the Code of Civil Procedure, may not enter into an investigation of questions of title to property included in the order and alleged by objectors to the granting of such order to have been devised for a valuable consideration, and for that reason exempt from sale until after the disposition of all the other property belonging to the estate.—*In re Tuohy's Estate*, 230.

Specific Devises—Exemptions from Sale for Debts of Estate.

4. Specific devises made for valuable consideration are not exempt from sale for the payment of the debts of the estate, provided for by section 1822 of the Civil Code; nor are the devisees entitled to have the sale of them postponed until other property specifically devised, no matter for what purpose, has been resorted to for the liquidation of such debts.—*In re Tuohy's Estate*, 230.

Specific Devises—Sale—Payment of Debts of Estate.

5. Specific devises, whether made for charitable purposes, or for valuable consideration, fall within the fifth class enumerated in sec-

tion 1822 of the Civil Code, and no distinction may be made among them, but all must be resorted to ratably for the payment of the debts of the testator, after the property falling in the first four classes has been exhausted for that purpose.—In *re Tuohy's Estate*, 230.

Claims Against Estate—Statute of Limitations.

6. When claims have been presented and allowed and are not contestable because not presented in time (Code of Civil Procedure, section 2603), or because barred at the time of the presentation (*Id.*, section 2609), the statutory limitations do not run against them.—In *re Tuohy's Estate*, 230.

Real Estate—Order of Sale—Adverse Possession.

7. The question of adverse possession as between an executor and a devisee may not be tried by the district court sitting as a court of probate, upon an application for the sale of real estate.—In *re Tuohy's Estate*, 230.

Real Estate—Order of Sale—Laches.

8. *Quære*: May district courts, when sitting in probate, deny an order for the sale of real estate, where it appears that there has been such unreasonable delay in making the application as to amount to laches?—In *re Tuohy's Estate*, 230.

Real Estate—Order of Sale—Laches.

9. Where it appeared, on an application to the probate court for an order of sale of real estate, that the estate had been involved in litigation until about a year before the application, and that appellants, who objected to the granting of the order, desiring that the property belonging to the estate and particularly that portion devised to them should not be sold, had encouraged the executor to make leases of mining claims belonging to the estate, a finding by the court that under all the circumstances there had been no unreasonable delay on the part of the executor in making the application was justified—assuming that the defense of laches could be invoked to defeat the application.—In *re Tuohy's Estate*, 230.

Real Estate—Order of Sale—Findings—*Res Judicata*.

10. (On motion for rehearing.) A finding by a probate court on an application by an executor to sell real estate, that the real estate, alleged to have been devised to appellants for a valuable consideration, belonged to the estate, was outside of its jurisdiction, since the question of title could not be inquired into by it, and such finding, being wholly immaterial and upon a subject outside of the purview of the application, may not be considered *res judicata*, upon affirmation of the order of sale by the supreme court.—In *re Tuohy's Estate*, 230.

PROHIBITION.

Appealable Orders—Motion to Quash—Demurrer.

1. Under Code of Civil Procedure, section 1722, as amended by Session Laws, 1899, page 146, neither an order sustaining a demurrer, nor an order sustaining a motion to quash an alternative writ of prohibition is appealable.—*State ex rel. Allen v. Hawkins et al.*, 177.

PROMISSORY NOTES.

See Negotiable Instruments.

PUBLIC ADMINISTRATORS.

Banks—Funds of Estates—Mingling in One Deposit—Effect.

1. A public administrator mingled the funds derived from a number of estates in one general deposit in bank. There was nothing to in-

dicating to the officers of the bank the source from which the moneys came. After the administrator's removal by the district court and the appointment of a special administrator for certain of the estates, the latter brought suit against the bank to recover a balance of \$2,539.02 remaining to the credit of the defaulting public administrator. The court found that this sum belonged to one certain estate. *Held*, that in so finding the court erred, since the funds, when mingled in one general deposit in the bank, lost their identity, and that it was therefore impossible for the court to say that they belonged to any particular estate.—*Raban v. Cascade Bank*, 413.

Mingling of Funds of Estates—Conversion.

2. The mingling of all funds, received by a public administrator from the different estates in his charge, in one general deposit in a bank, in face of the provision of section 4521 of the Political Code, requiring him to deposit such moneys with the county treasurer, who is required to keep a separate account with each estate, constitutes conversion.—*Raban v. Cascade Bank*, 413.

PUBLIC LANDS.

Trusts—Fraud.

1. A trust cannot result in one of two persons for the benefit of the other, if they intended and agreed to obtain land from the government unlawfully and fraudulently; and the court, in such a case, in a suit between themselves as to the land, will leave the parties where it finds them.—*Keely v. Gregg et al.*, 216.

Fraud—Concealment of Equities—Rights of Parties.

2. (On rehearing.) The fact that a person perfecting the title to scrip land was acting as trustee for another, and that both he and his *cestui que trust* intended to conceal from the federal land office their true relations, does not preclude the enforcement of the trust, where all the facts were known to and considered by the government officials before issuing the patent, and the government knowingly and willingly conveyed the land to the trustee, leaving him and his *cestui que trust* to settle the equities between themselves in the courts after patent issued.—*Keely v. Gregg et al.*, 216.

Unlawful Fencing—Trespassers—Injunction.

3. By unlawfully inclosing portions of the public domain, a person acquires no such right therein as will enable him to protect his possession against the trespasses of another person, by invoking the injunctive power of a court of equity.—*Clemmons v. Gillette et al.*, 321.

School Lands—Leasing by State Prior to Survey—Rights of Lessee.

4. *Obiter*: The state acquires no such right, under its grant of lands from the United States government in aid of common schools, as will enable it, prior to the official survey by the United States and approval of the plat by the commissioner of the general land office, to lease the lands so granted, and thereby give to a citizen of the state an exclusive right to the use and enjoyment of such lands.—*Clemmons v. Gillette et al.*, 321.

Unlawful Fencing—Injunction.

5. Since a person who unlawfully fences a portion of the public domain, thus having only a tortious possession, cannot maintain an action against another for depasturing such land, he cannot have incidental relief, by way of injunction, to restrain the latter from continuing to depasture the land.—*Clemmons v. Gillette et al.*, 321.

Land Department—Findings of Officers—Conclusiveness.

6. In the absence of fraud, a finding of the officers of the Land Department, to the effect, that two applications to make entry of the same parcel of public land were tendered simultaneously, is conclusive upon the courts.—*Love v. Flahive et al.*, 348.

Homestead Applications—Simultaneous Filing.

7. Where two applications for homestead entry on the same land were filed simultaneously, after the expiration of three months from the date the official plat was approved and filed in the local land office, a finding of the Secretary of the Interior that the applicant who had preserved his right to the land intact since his settlement should be given preference over the other, who had relinquished or abandoned his right, in the absence of evidence that the latter's right had been re-established prior to the date of settlement by the former applicant, was proper.—*Love v. Flahive et al.*, 348.

Homestead Applications—Questions of Fact—Land Department.

8. As between two simultaneous applications for entry of homestead land, the question as to which of the applicants had made the prior settlement was a question of fact for the determination of the Land Department.—*Love v. Flahive et al.*, 348.

QUIETING TITLE.

See Mines and Mining.

RAILROADS.

See, also, Variance, 8.

Killing of Live Stock—Pleadings—Complaint.

1. A complaint in an action for the killing of live stock by a railroad company, brought under section 2680, Revised Statutes of Idaho, which failed to allege that at the time of the killing the defendant company was operating a line of railroad within that state, but stated that the defendant "is a corporation" and "is the owner, controller and operator" of a railroad—which allegations are referable to the time the complaint was verified and filed, and not to the date on which the stock was killed—failed to state a cause of action.—*McKnight v. Oregon Short Line R. Co.*, 40.

Killing of Live Stock—Pleadings—Complaint.

2. A complaint, in an action for the killing of live stock by a railroad company, brought under a statute of Idaho (Rev. Stats., sec. 2680), which did not allege that a claim in writing, for the damages suffered by the owner, had been made upon the defendant company, was fatally defective.—*McKnight v. Oregon Short Line R. Co.*, 40.

Trial—Opening Statement—Grounds of Recovery—Waiver.

3. Where, in an action against a railroad company for killing live stock, plaintiff's counsel at the opening of the trial stated to the court that he relied on the cause of action set out in his complaint relative to a defective fence, he thereby waived any other ground for recovery mentioned in the complaint.—*Metlen v. Oregon Short Line R. Co.*, 45.

Killing Live Stock—Fences—Complaint.

4. A complaint in an action against a railroad company for the killing of live stock, which fails to allege plaintiff's ownership or possession of the land along or through which the railroad runs at the point where the animals were killed, fails to state facts sufficient to constitute a cause of action. (*Beaudin v. Oregon Short Line R.*

Co., 31 Mont. 238, 78 Pac. 303.)—Metlen v. Oregon Short Line R. Co., 45.

Killing Live Stock—Evidence—*Res Gestae*.

5. In an action against a railroad company for the killing of live stock, brought under section 951 of the Civil Code, the testimony of a witness that the section boss showed him where the animal was when struck, and stated that after it was struck he killed it to end its sufferings, was not admissible as *res gestae*.—Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co., 338.

Killing Live Stock—Evidence—Motion to Strike.

6. Where, in an action against a railroad company for the killing of live stock, a witness was permitted, without objection, to testify to certain declarations of a section boss who witnessed the accident, and counsel for defendant thereupon cross-examined the witness, notwithstanding the evidence was clearly hearsay, and then for the first time moved to have it stricken out, the effort to exclude it came too late, and the district court properly denied the motion.—Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co., 338.

Killing of Live Stock—Pleadings—Proof.

7. *Held*, in an action against a railroad company to recover for the killing of live stock, under Civil Code, section 951, that proof of an injury to an animal which would inevitably result in its death, substantially supports an allegation of killing.—Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co., 338.

Killing of Live Stock—Negligence—Instructions.

8. An instruction given in an action, brought under section 951 of the Civil Code, against a railroad company, for the killing of live stock, to the effect that the law presumed such killing to have been the result of defendant's negligence, correctly stated the law, even though it appeared that while the animal was fatally injured by the locomotive and cars of the defendant, the actual killing was done by one of defendant's employees to end its sufferings. [Mr. Justice Milburn dissenting.]—Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co., 338.

RANGE STOCK.

See Municipal Corporations, 3, 4; Live Stock.

REAL ESTATE.

See, also, Probate Proceedings.

Brokers—Contracts—Statute of Frauds.

1. Where it did not appear that a broker's contract of employment to sell real estate was in writing, or that any note or memorandum thereof, signed by the party to be charged, had been executed as required by Civil Code, section 2185, subdivision 6, no recovery could be had for services rendered thereon.—Marshall v. Terrise et al., 28.

Sale—Agents—Counterclaims—Conflicting Instructions.

2. In an action on a promissory note for \$700, where a counterclaim was interposed setting up that plaintiff was indebted to defendants in the sum of \$1,000 for services performed by one of them as real estate agent, instructions examined and *held* not to be conflicting.—Marshall v. Terrise et al., 28.

RECORD.

See, also, Costs, 4, 5, 6, 8; Exhibits.

Appeal—Contents—Evidence.

1. Code of Civil Procedure, section 1173, does not require that the record on appeal must show that it embraces *all* the evidence introduced at the trial of the case, but only such as is necessary to make the statement truly represent the case.—Hickey et al. v. Anaconda Copper M. Co. et al., 46.

Appeal—Exhibits—Certificate of Judge—Imports Verity.

2. In the absence of any showing that exhibits, alleged to have been omitted from the record on appeal are material to the consideration of the appeal, the certificate of the presiding judge will be accepted by the appellate tribunal as importing verity, and the statement considered as containing all the matter necessary to make it truly represent the case.—Hickey et al. v. Anaconda Copper M. Co. et al., 46.

Practice—Appeal—Evidence.

3. When the question raised by appellant has to do with the admissibility of a particular item of evidence which, if not rejected, would have tended to prove the issue, the record need not contain all of the evidence.—Mackel v. Bartlett, 123.

REHEARINGS.

Appeal—When Rehearing will not be Granted.

1. The fact that the supreme court did not, on the original hearing, consider and decide a question not assigned in the brief and not properly before it, is not ground for rehearing.—In re Tuohy's Estate, 230.

RELATION—DOCTRINE OF.

Mines—Location—Patent.

1. The question whether a patent to a mining claim relates back to the date of its location must be determined by the facts of each particular case.—Hickey et al. v. Anaconda Copper M. Co. et al., 46.

Mines—Patent.

2. Where the declaratory statement, filed in support of a mining location was void, the patent subsequently issued did not, by relation, give validity to the location at a date antecedent to the application for the patent.—Hickey et al. v. Anaconda Copper M. Co. et al., 46.

REMITTITUR.

Costs—Appeal—Supreme Court Opinion—Copy.

1. Where a judgment or order of the trial court is reversed or modified, a copy of the opinion of the supreme court must accompany the *remittitur* (Rule XIX of Supreme Court, 30 Mont. xlii, and it was error for the district court, on a motion to tax the costs of an appeal, to disallow an item charged for a copy of such opinion.—Montana Ore Pur. Co. v. Boston & Mont. C. C. & S. M. Co., 400.

REPLEVIN.

See Claim and Delivery.

RES GESTAE.

See Evidence.

RES JUDICATA.

Real Estate—Order of Sale—Findings.

1. (On motion for rehearing.) A finding by a probate court on an application by an executor to sell real estate, that the real estate, alleged to have been devised to applicants for a valuable consideration, belonged to the estate, was outside of its jurisdiction, since the question of title could not be inquired into by it, and such finding, being wholly immaterial and upon a subject outside of the purview of the application, may not be considered *res judicata*, upon affirmation of the order of sale by the supreme court.—*In re Tuohy's Estate*, 230.

REVIEW.

See Appeal.

RULES OF SUPREME COURT.

See, also, Exhibits 3; Remittitur, 1.

Appeal—Briefs—Assignments of Error.

1. Errors not assigned in appellant's brief, in accordance with subdivision 3 of Rule X of the Rules of the Supreme Court, but only called to the court's attention on oral argument, will not be considered on appeal.—*Dorais v. Doll et al.*, 314.

Costs—Stenographers—Verbatim Copies—Excessive Charges.

2. A charge of ten cents per folio, in a memorandum of costs, for verbatim copies of the testimony incorporated in a bill of exceptions, as permitted by the Rules of the Supreme Court (Rule VII, 30 Mont. xxxiv, 82 Pac. ix, is excessive, the legal fee under Code of Civil Procedure, section 373, being five cents per folio.—*Montana Ore Pur. Co. v. Boston & Mont. C. C. & S. M. Co.*, 400.

SALES.

See, also, Claim and Delivery.

Requisites—Instructions.

1. A requested instruction which told the jury that before a person can recover for goods delivered by him, he must prove a request therefor by the party to whom they are delivered, was properly refused; because recovery may be had if delivery to, and acceptance of the goods by, the intended purchaser, and a promise expressed or implied, on the part of the purchaser to pay for them, are shown.—*Smith et al. v. Perham*, 309.

Recovery of Price.—Instructions.

2. An instruction in an action to recover for materials furnished, to the effect that the only question for the jury to determine was whether or not defendant received from plaintiff the goods in controversy, was erroneous, since the mere delivery of goods by one person to another is not of itself sufficient to create a liability for their value; in order to do so, such delivery and acceptance must have occurred under such circumstances as that the law will imply a promise to pay for them.—*Smith et al. v. Perham*, 309.

Action for Price—Complaint—Sufficiency.

3. A complaint in an action for goods sold, which alleges that during a time specified, plaintiff furnished and delivered to defendant certain goods of a specified value, that defendant received the same and used them for his own benefit, and that he has not paid therefor, states no cause of action, its allegations not being inconsistent with a gift.—*Smith et al. v. Perham*, 309.

Action for Price—Trial—Variance.

4. Where the contract sued upon was one under which defendant purchased the goods described in the complaint, and recovery was had upon one, made by defendant subsequently to the time the goods were sold, by which he agreed to pay for the goods, sold and delivered to his codefendant, in consideration of the release of his property from attachment, there was a fatal variance between the allegations of the complaint and the proof.—*Kalispell Liquor & Tobacco Co. v. McGovern et al.*, 394.

Personal Property—Husband and Wife—Presumptions

5. *Quere*: Is section 4491 of the Civil Code, relative to transfers of personal property conclusively presumed to be fraudulent, applicable to transfers between husband and wife?—*Webster v. Sherman*, 448.

SCHOOL LANDS.

See, also, Public Lands, 4.

Normal School Lands—Bond Issues—Constitutionality.

1. Chapter 3 of Session Laws of 1905 (page 3), authorizing the state board of land commissioners to issue and sell bonds, the proceeds to be applied to the erection, furnishing and equipment of an addition to the state normal school building, and pledging as security for the payment of the principal and interest on such bonds the lands granted by section 17 of the Enabling Act (25 Statutes at Large, 676), is void because in violation of section 12, Article XI, of the Constitution of Montana, which provides that the funds of the state institutions of learning, from whatever source secured, shall be invested and only the interest from such funds, together with the rents from leased lands belonging to the normal school grant, devoted to the maintenance of such school.—*State ex rel. Haire v. Rice*, 364.

State Normal School Lands—Enabling Act—Constitution—Conflict.

2. *Held*, that section 17 of the Enabling Act (25 Statutes at Large, 676), which grants certain lands to the state of Montana for the state normal school and provides for the manner in which such lands shall be held and disposed of and the funds derived therefrom applied, and section 12 of Article XI of the Constitution of the state, under which the legislature may prescribe the manner in which the funds shall be loaned, are not in conflict.—*State ex rel. Haire v. Rice*, 364.

Enabling Act—Construction—*Communis Error Facit Jus*.

3. *Held*, that the construction given to section 17 of the Enabling Act (relating to grants of land to the state normal school and their disposition) by the legislature of Montana, as evinced by legislative authorization of bond issues against the various land grants, has not been so uniform or made under such circumstances as to render applicable the maxim, "*Communis error facit jus*."—*State ex rel. Haire v. Rice*, 364.

State Normal School—Enabling Act—Construction.

4. *Semble*: It would seem that the early assemblies of the state legislature understood that the Congress in the Enabling Act (25 Statutes at Large, 676), relative to grants of land for state normal school purposes, meant that the state should, in the first instance, erect the necessary buildings for such institution out of its own funds, and that the grant made in section 17 of that Act should constitute an endowment for the maintenance and perpetuation of such school.—*State ex rel. Haire v. Rice*, 364.

SELF-SERVING DECLARATIONS.

See Declarations.

SERVICE.

See New Trial, 5, 11.

SHERIFFS.**Attachment—Dismissal.**

1. Held, that, under sections 903 and 911 of the Code of Civil Procedure, on the dismissal of an attachment, the sheriff is bound to account to the successful defendant for moneys collected under the attachment from such defendant's debtor.—*Michener v. Fransham*, 108.

Dismissal—Recovery of Property Attached—Burden of Proof.

2. Held, that where an attachment suit against joint defendants was dismissed as to one of them, who thereupon brought suit against the sheriff to recover money collected by the latter under the attachment, the burden was on such defendant to show that the money belonged to himself, after which the burden was cast upon the sheriff to show, if he could, that such was not the fact, but that he was entitled to hold the money to apply upon any judgment which the attachment plaintiff might recover against the other attachment defendant.—*Michener v. Fransham*, 108.

Compensation—Mileage—Statutes—Constitution.

3. Appellant was elected sheriff in November, 1904. The law then in force (Pol. Code, sec. 4604) allowed the sheriff ten cents per mile actually and necessarily traveled and ten cents per mile for each person transported to the state prison, reform school and insane asylum. In 1905, after appellant had entered upon the discharge of his duties, the legislature by Act approved March 3, 1905 (Session Laws, 1905, c. 86, p. 180), amended section 4604 so as to allow sheriffs only actual traveling expenses for such transportation. Held, that section 31, Article V, of the Constitution prohibiting the increasing or diminishing of a public officer's salary or emolument during his term of office, is not violated by Act of March 3, 1905, when applied to officers elected prior to its passage.—*Scharrenbroich v. Lewis & Clark County*, 250.

STATE BONDS.

See School Lands.

STATE LANDS.

See School Lands.

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STATUTE OF FRAUDS.

Real Estate—Brokers—Contracts.

1. Where it did not appear that a broker's contract of employment to sell real estate was in writing, or that any note or memorandum thereof, signed by the party to be charged, had been executed as required by Civil Code, section 2185, subdivision 6, no recovery could be had for services rendered thereon.—*Marshall v. Trerize et al.*, 28.

Promise to Answer for Debt of Another.

2. An oral promise to pay for goods purchased by another, in case the latter failed to pay for them, is void under the statute of frauds.—*Kalispell Liquor & Tobacco Co. v. McGovern et al.*, 394.

Promise to Pay Debt of Another—Original Obligation.

3. The promise of one to pay a debt owing by another, in consideration of the release of the promisor's property from attachment, is an original obligation which need not be in writing.—*Kalispell Liquor & Tobacco Co. v. McGovern et al.*, 394.

STATUTES OF LIMITATIONS.

See Limitations.

STATUTORY CONSTRUCTION.

Live Stock—Assessment—Amendment—Repeal.

1. Under the provisions of section 5163 Political Code, section 3720 of the same Code, relating to the assessment of live stock, was not repealed by section 3943 as amended (Laws 1903, p. 225), the former section being part of Chapter III, Title X, treating of assessment of property generally, and the latter, part of Chapter IX, of the same Title, having to do with the collection of taxes on certain personal property.—*Flowerree Cattle Co. v. Lewis & Clark Co.*, 32.

Mines—Declaratory Statement—Verification—Constitutionality.

2. The Act of 1873 (Laws Extra. Session, 1873, p. 83) declaring that any person who shall discover any mining claim upon any vein or lode bearing gold, silver, etc., shall, within twenty days thereafter, make and file for record in the recorder's office of the county in which the discovery is made a declaratory statement thereof in writing, on oath, describing such claim in the manner provided by the laws of the United States, etc., was not unconstitutional, as in conflict with United States Revised Statutes, section 2324 (U. S. Comp. Stats. 1901, p. 1426), which does not require the notice or declaratory statement to be verified.—*Hickey et al. v. Anaconda Copper M. Co. et al.*, 46.

Escheated Estates—Recovery—Limitations.

3. Under the provisions of Political Code, section 5162, the limitation of twenty years prescribed by Code of Civil Procedure, section 2253, within which to file petition in the district court to determine one's heirship to escheated property, is exclusive, and the limitation periods prescribed for ordinary actions have no application to such a proceeding.—*In re Pomeroy*, 69.

Escheated Estates—Recovery.

4. Sections 1867-1869, inclusive, of the Civil Code, granting the right of succession to aliens and providing a mode by which non-resident aliens can be paid out of the treasury of the state, under certain limitations, after property of their ancestor has been converted and its proceeds turned over to the state treasurer, have no application to cases in which citizens of the United States appear as claimants.—*In re Pomeroy*, 69.

Escheated Estates—Recovery—Retroactive Effect.

5. *Held*, under Code of Civil Procedure, section 3451, which declares that no part of said code is retroactive, unless expressly so declared, that property reduced to possession by the state in escheat proceedings prior to the enactment of the Code of Civil Procedure

of 1895, cannot be recovered by the heir in a proceeding under section 2253 thereof.—*In re Pomeroy*, 69.

Taxation—Trust Companies—Constitutionality.

6. Civil Code, section 611, providing that the property of trust deposit and security corporations shall be assessed for purposes of taxation in the same manner as national banks, is, in view of the fact that section 5219 of the United States Revised Statutes limits the right of the state to tax such banks to the taxation of their real estate, and their stockholders to the shares of capital stock owned by them, repugnant to Article XII, sections 1 and 7 of the Constitution of Montana, in that it exempts the personal property of such companies from taxation.—*Daly Bank & Trust Co. v. Board of County Commrs.*, 101.

Taxation—Banks and Trust Companies—Constitution.

7. The purpose of section 3701, subsection 6, of the Political Code, which provides for the taxation of solvent credits, less such debts as may be owing by the taxpayer, being merely to ascertain the just amount and value of property subject to taxation, in conformity with section 1, Article XII of the Constitution, does not have the effect of exempting from taxation property other than that enumerated in section 2 of said Article, and is therefore not unconstitutional.—*Daly Bank & Trust Co. v. Board of County Commrs.*, 101.

Anti-Trust Legislation—Constitutional Law.

8. Section 321 of the Penal Code, prohibiting the formation of combinations or trusts for the purpose of fixing the price or regulating the production of articles of commerce, and prescribing penalties for violations thereof, is, by reason of the provisions of section 325 of the same Code, to the effect that such prohibition shall not apply to persons engaged in agriculture and horticulture, obnoxious to that portion of the Fourteenth Amendment to the federal constitution which declares that "no state shall deny to any person within its jurisdiction the equal protection of the laws," and both sections, being dependent upon each other, are therefore void.—*State v. Cudahy Packing Co. et al.*, 179.

Elimination.

9. Courts may not by process of elimination make statutory provisions apply or extend to subjects not falling clearly within their terms.—*State v. Cudahy Packing Co. et al.*, 179.

Meaning of Words Used.

10. Where the intention of the legislature may be inferred from the plain meaning of the words of a statute, the court cannot go further and apply other means of interpretation; it being only where there is a doubt as to the intention that other rules may be applied.—*State v. Cudahy Packing Co. et al.*, 179.

Sheriffs—Mileage—Constitution.

11. Appellant was elected sheriff in November, 1904. The law then in force (Pol. Code, sec. 4604) allowed the sheriff ten cents per mile actually and necessarily traveled and ten cents per mile for each person transported to the state prison, reform school and insane asylum. In 1905, after appellant had entered upon the discharge of his duties, the legislature by Act approved March 3, 1905 (Session Laws, 1905, c. 86, p. 180), amended section 4604 so as to allow sheriffs only actual traveling expenses for such transportation. *Held*, that section 31, Article V, of the Constitution prohibiting the increasing or diminishing of a public officer's salary or emolument

during his term of office, is not violated by Act of March 3, 1905, when applied to officers elected prior to its passage.—*Scharrenbroich v. Lewis & Clark County*, 250.

Normal School Lands—Bond Issues—Constitutionality.

12. Chapter 3 of Session Laws of 1905 (page 3), authorizing the state board of land commissioners to issue and sell bonds, the proceeds to be applied to the erection, furnishing and equipment of an addition to the state normal school building, and pledging as security for the payment of the principal and interest on such bonds the lands granted by section 17 of the Enabling Act (25 Statutes at Large, 676), is void because in violation of section 12, Article XI, of the Constitution of Montana, which, provides that the funds of the state institutions of learning, from whatever source secured, shall be invested and only the interest from such funds, together with the rents from leased lands belonging to the normal school grant, devoted to the maintenance of such school.—*State ex rel. Haire v. Rice*, 365.

Contemporaneous Construction.

13. The doctrine of contemporaneous construction only becomes effective when there is a reasonable doubt as to the meaning of the provision to be construed, and acquiescence for no length of time in a construction by co-ordinate branches of the government, which has the effect of nullifying a provision of the Constitution, will justify the courts in adopting such construction unless it is the only reasonable one.—*State ex rel. Haire v. Rice*, 365.

Mortgage Liens.

14. *Held*, under Civil Code, sections 3865, 3866 and 3867, that the time fixed in an affidavit of renewal of a chattel mortgage marks the utmost limit of the life of the mortgage lien as against attaching creditors of the mortgagor, and the sixty days of grace mentioned in section 3865 have reference only to such period of time from the maturity of the debt as fixed at the execution of the mortgage, and not to any such period after the maturity of the debt as fixed by some subsequent agreement of the parties to the mortgage.—*Rosenbaum Bros. & Co. v. Ryan Bros. Cattle Co.*, 424.

Costs—Service of Memorandum.

15. *Held*, that the provisions of section 1867 of the Code of Civil Procedure with reference to service upon the adverse party of memorandum of the items of costs and disbursements claimed by the party in whose favor judgment is rendered, are applicable to proceedings under section 1869 of the same Code, relative to costs awarded by an appellate court.—*State ex rel. Riddell v. District Court et al.*, 529.

STENOGRAPHERS.

See Costs, 4, 5, 6; Principal and Agent, 4-6.

SUPREME COURT.

See, also, Rules of Supreme Court.

Disbarment—Jurisdiction—Crimes and Misdemeanors.

1. The supreme court has exclusive jurisdiction in a disbarment proceeding to hear the evidence and determine the truth of charges of crimes and misdemeanors involving moral turpitude, whether committed within this jurisdiction or not, and whether within or without the sphere of official duty.—*In re Thresher*, 441.

Disbarment—Crimes Falling Without Sphere of Official Duty.

2. Where the crime charged against attorney, in a disbarment proceeding, falls clearly without the sphere of official duty, it is discretionary with the supreme court to hear and determine it upon the merits prior to a criminal prosecution and conviction in the proper court.—In re Thresher, 441.

Disbarment—When Supreme Court Will not Take Jurisdiction.

3. The supreme court will refuse to entertain an accusation against an attorney in a disbarment proceeding, where the crime charged falls clearly without the sphere of official duty, unless urgent reasons are shown why it should do so.—In re Thresher, 441.

Disbarment—District Courts—Criminal Proceedings.

4. Where the conduct charged as ground for the disbarment of an attorney falls within the sphere of official duty, the supreme court will hear and determine the matter, regardless of the fact that it amounts to an offense against the criminal laws of the state, and will not wait to inquire whether criminal proceedings have been instituted and prosecuted to a conclusion.—In re Thresher, 441.

TAXATION.

Live Stock—Where Assessable.

1. *Held*, that where a corporation, engaged in the live stock business, grazed its cattle in T. county, in which county the corporate headquarters were maintained, where its real estate was situate, and where its business manager and foreman resided, caused a large number of its live stock to be driven into L. & C. county to be wintered, with the intention of having it returned to the former county in the following spring, the *situs* of such live stock for the purposes of taxation—its home—was in the former county, and not in the latter—its temporary abode.—*Flowerree Cattle Co. v. Lewis & Clark County*, 32.

Live Stock—Assessment—Statutes—Amendment—Repeal.

2. Under the provisions of section 5163, Political Code, section 3720, of the same Code, relating to the assessment of live stock, was not repealed by section 3943 as amended (Laws 1903, p. 225), the former section being part of Chapter III, Title X, treating of assessment of property generally, and the latter, part of Chapter IX, of the same Title, having to do with the collection of taxes on certain personal property.—*Flowerree Cattle Co v. Lewis & Clark County*, 32.

Trust Companies—Statutes—Constitutionality.

3. Civil Code, section 611, providing that the property of trust deposit and security corporations shall be assessed for purposes of taxation in the same manner as national banks, is, in view of the fact that section 5219 of the United States Revised Statutes limits the right of the state to tax such banks to the taxation of their real estate, and their stockholders to the shares of capital stock owned by them, repugnant to Article XII, sections 1 and 7 of the Constitution of Montana, in that it exempts the personal property of such companies from taxation.—*Daly Bank & Trust Co. v. Board of County Commrs.*, 101.

State Banks and Trust Companies—Stock.

4. Since stocks of a state bank or trust company fall within the definition of *property* as given in section 17 of Article XII of the Constitution of this state and in subdivisions 1 and 4 of section 3680 of the Political Code, they must be assessed to the owners at their full cash value, except to the extent that that value is rep-

resented in property which is assessed to the bank or trust company.—*Daly Bank & Trust Co. v. Board of County Commrs.*, 101.

Banks and Trust Companies—Solvent Credits—Deduction of Just Debts.

5. For the purposes of taxation, a state bank or trust company may deduct from its solvent credits its just debts, provided it makes the proper return to the assessor, claims the reduction, and otherwise complies with the law; and all its remaining property is subject to taxation, the same as the property of a natural person.—*Daly Bank & Trust Co. v. Board of County Commrs.*, 101.

Banks and Trust Companies—Statutory Construction—Constitution.

6. The purpose of section 3701, subsection 6, of the Political Code, which provides for the taxation of solvent credits, less such debts as may be owing by the taxpayer, being merely to ascertain the just amount and value of property subject to taxation, in conformity with section 1, Article XII of the Constitution, does not have the effect of exempting from taxation property other than that enumerated in section 2 of said Article, and is therefore not unconstitutional.—*Daly Bank & Trust Co. v. Board of County Commrs.*, 101.

Cities—Special Improvements—Levy—When Void.

7. Taxes levied by a city for special improvement purposes are absolutely void, where the city council proceeds to create an improvement district, notwithstanding owners representing more than one-half of the area of the property to be assessed to defray the cost of such improvement, appear before it and object to the final adoption of the resolution creating the district for the purpose indicated.—*Hensley v. City of Butte et al.*, 206.

Cities—Special Improvements—Void Levy—Remedies.

8. Where a tax levied by a city for special improvement purposes was manifestly void under all circumstances and not merely "irregularly levied or demanded," the remedy provided by Political Code, sections 4024-4026, is not exclusive, but the aid of a court of equity by way of injunction may be invoked to restrain the collection of such tax.—*Hensley v. City of Butte et al.*, 206.

TELEPHONES.

Municipal Corporations—Use of Streets—*Mandamus*.

1. A telephone company, having the absolute right to use the streets of a city for the erection of its poles and construction of its lines, subject only to such reasonable regulations by the city as to *where in the streets* the poles and other appliances should be placed, cannot compel the city by *mandamus* to designate the streets, avenues and alleys upon which to place its necessary appliances.—*State ex rel. Rocky Mt. B. Tel. Co. v. Mayor etc. of Red Lodge*, 345.

THEORY OF CASE.

Forcible Entry—Pleadings—Sufficiency—Appeal.

1. Where the case was tried on the theory that the complaint stated a cause of action for a forcible entry under Code of Civil Procedure, section 2080, without objection by either party, its sufficiency will be determined on this theory on appeal, although it contains some allegations more appropriate to an action of ejectment.—*Spellman v. Rhode*, 21.

TRANSCRIPTS.

See Record.

TRESPASSERS.

See Personal Injuries, 2; Public Lands, 3-5.

TRIAL.

Opening Statement—Grounds of Recovery—Waiver.

1. Where, in an action against a railroad company for killing live stock, plaintiff's counsel at the opening of the trial stated to the court that he relied on the cause of action set out in his complaint, relative to a defective fence, he thereby waived any other ground for recovery mentioned in the complaint.—*Metlen v. Oregon Short Line R. Co.*, 45.

What Constitutes—Criminal Law.

2. The word "trial" as used in section 16, Article III, of the Constitution, embraces all proceedings in the progress of a criminal prosecution after the issues are made up, down to and including the rendition of the verdict.—*State v. Koch*, 490.

TRUST COMPANIES.

See Banks.

TRUSTS.

See, also, Monopolies.

Fraud—Public Lands.

1. A trust cannot result in one of two persons for the benefit of the other, if they intended and agreed to obtain land from the government unlawfully and fraudulently; and the court, in such a case, in a suit between themselves as to the land, will leave the parties where it finds them.—*Keely v. Gregg et al.*, 216.

Public Lands—Fraud—Concealment of Equities—Rights of Parties.

2. (On rehearing.) The fact that a person perfecting the title to scrip land was acting as trustee for another, and that both he and his *cestui que trust* intended to conceal from the federal land office their true relations, does not preclude the enforcement of the trust, where all the facts were known to and considered by the government officials before issuing the patent, and the government knowingly and willingly conveyed the land to the trustee, leaving him and his *cestui que trust* to settle the equities between themselves in the courts after patent issued.—*Keely v. Gregg et al.*, 216.

UNDERTAKINGS.

See Bonds.

UNLAWFUL DETAINER.

See Justice of the Peace, 6, 7.

VARIANCE.

Forcible Entry—Pleadings—Proof.

1. Where, in an action under Code of Civil Procedure, section 2080, subdivision 1, for a forcible entry, the evidence showed a peaceable entry, and a subsequent forcible turning out of plaintiff, which conduct is made a forcible entry by subdivision 2 of said section, the variance was such as to constitute a failure of proof, within section 772 of the same code, providing that when the allegation of the claim to which the proof is directed, is unproved in its general scope

and meaning, it shall be regarded as a failure of proof.—*Spellman v. Rhode*, 21.

Criminal Law—*Idem Sonans*.

2. Defendant was convicted of the crime of robbery. The information stated the name of the injured person as "Frank Rex," whereas his own testimony showed that it was "Frank Röck." There was not any showing that he was named, or had been known as, Frank Rex. *Held*, that, the names being unlike in sound or spelling, and the information having failed to disclose any description which made it at all certain that "John Rex" and "John Röck" were one and the same person, the variance was fatal to conviction.—*State v. Lee*, 203.

Railroads—Killing of Live Stock—Complaint—Proof.

3. The complaint in an action against a railroad company to recover for cattle killed by it, under section 951 of the Civil Code, alleged that the company so negligently managed its locomotive and cars as to kill the animal in question. The proof showed that while the animal had been fatally injured, it was actually killed by a section boss in defendant's employ, to end its sufferings. *Held*, that the defendant not having been misled by the variance, and substantial justice having been done between the parties (Code Civ. Proc., secs. 770, 778), the judgment will not be reversed because of the variance.—*Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co.*, 338.

Appeal.

4. The question of variance will not be considered when raised for the first time on appeal.—*Kalispell Liquor Tobacco Co. v. McGovern et al.*, 394.

Sales—Action for Price—Trial.

5. Where the contract sued upon was one under which defendant purchased the goods described in the complaint, and recovery was had upon one, made by defendant subsequently to the time the goods were sold, by which he agreed to pay for the goods, sold and delivered to his codefendant, in consideration of the release of his property from attachment, there was a fatal variance between the allegations of the complaint and the proof.—*Kalispell Liquor & Tobacco Co. v. McGovern et al.*, 394.

Nonsuit—Failure to Object to Testimony.

6. Defendant is not precluded from moving for a nonsuit upon the ground of a fatal variance between the allegations of the complaint and the proof, by his failure to object to the introduction of testimony by plaintiff.—*Kalispell Liquor & Tobacco Co. v. McGovern et al.*, 394.

When Failure of Proof.

7. Where the contract upon which recovery is had is wholly different from the one set forth in the complaint, the case is brought within section 772 of the Code of Civil Procedure, which provides that in such a case the variance is not to be deemed immaterial, but must be considered a failure of proof.—*Kalispell Liquor & Tobacco Co. v. McGovern et al.*, 394.

VERDICTS.

Equity—Jury Trial—District Courts—Directing Verdict.

1. Where the cause of action stated in the complaint is one of purely equitable cognizance, and no issue is presented which would entitle either of the parties to a jury trial, the court may direct

the jury in attendance to return a verdict, even though the evidence be conflicting.—*Short v. Estey et al.*, 261.

District Courts—Equity—Directing Verdict—Findings.

2. The rendition of a verdict by direction of the court, in an action involving questions of equitable cognizance, is equivalent to a finding of the court for the party in whose favor it was rendered.—*Short v. Estey et al.*, 261.

WAIVER.

Appeal—Briefs.

1. Matters specified as error on appeal, but not discussed in the brief, will be deemed waived.—*Sayre v. Johnson*, 15.

Trial—Opening Statement—Grounds of Recovery.

2. Where, in an action against a railroad company for killing live stock, plaintiff's counsel at the opening of the trial stated to the court that he relied on the cause of action set out in his complaint, relative to a defective fence, he thereby waived any other ground for recovery mentioned in the complaint.—*Metlen v. Oregon Short Line R. Co.*, 45.

Tort—Pledges—Accounting—Conversion—Election.

3. Where a pledgor demanded an accounting by the pledgee, not only of the proceeds derived from the use of the property pledged, but also for the price realized from a wrongful sale thereof, and thereafter sued to recover such sums, he thereby waived the pledgee's tort in converting the property.—*Demars v. Hudon*, 170.

Election Contests—Pleadings—Grounds of Contest.

4. Section 2010, Code of Civil Procedure, enumerates, among others, "malconduct on the part of the board of judges," and the reception of "illegal votes," as grounds for which any elector of a county may contest the right of one to hold an office therein to which he has been declared elected. Contestant in his statement of contest alleged malconduct on the part of the judges, in that they received and counted for respondent votes claimed to have been illegally cast at a precinct on an Indian reservation. *Held*, that each of the causes enumerated in section 2010 constitutes a separate cause of contest, each independent of the other, and that, while contestant may join grounds of contest embracing the several causes mentioned, if he does not do so, but elects to proceed upon one particular ground, he must be deemed to have waived any other ground enumerated.—*Coleman v. Kerr*, 198.

Trial—Administrators—Evidence—Exclusion.

5. In an action against the administrator of an estate to recover on negotiable paper, plaintiff's offered testimony was excluded as incompetent, under the provisions of section 3162 of the Code of Civil Procedure, as amended by Session Laws, 1897, page 245. Proof of decedent's testimony on a former trial was then introduced. The preservation of decedent's testimony had not been made to appear to the court up to the time of its introduction. *Held*, that by failure to renew his offer after the court had been made cognizant of the preservation of decedent's testimony, plaintiff waived any error in excluding the testimony in the first instance.—*Harrington v. Butte & Boston M. Co. et al.*, 330.

New Trial Statement—Service—Burden of Proof.

6. The burden of proving a waiver of insufficient service of a statement on motion for a new trial rests upon him who alleges it, and the

proof must be clear and satisfactory.—*Nord v. Boston & Mont. C. C. & S. M. Co.*, 464.

New Trial Statement—Service—Objection to Settlement.

7. An attorney who at each step taken in the settlement of a statement on motion for a new trial preserved his right to object to its settlement on the ground that legal, timely or sufficient service had not been made, did not waive the failure of service by appearing in court and asking for additional time in which to prepare amendments and thereafter filing same.—*Nord v. Boston & Mont. C. C. & S. M. Co.*, 464.

WATERS AND WATER RIGHTS.

Measure of Appropriation.

1. The measure of an appropriation of water does not depend upon the *average* amount of the water flowing in the stream, but upon the *greatest* amount, reference being had to the appropriator's needs for the water and his facility for conducting it to the place of intended use.—*Sayre v. Johnson*, 15.

Appropriation—Useful and Beneficial Purpose.

2. Where a successor in interest of an appropriator of water greatly increased the amount of grass for pasture by irrigation, such use of the water was a useful and beneficial one within the meaning of section 1881 of the Civil Code.—*Sayre v. Johnson*, 15.

Sale of Part of Water Appropriated—Effect—Appeal.

3. An owner of a water right of three hundred inches disposed of one hundred and sixty inches thereof, but repurchased the same as soon as possible upon discovering his mistake. *Held*, that while such sale was some evidence of the fact that the vendor did not have use for the full three hundred inches, yet, the district court having determined that he had use for the water and that the sale was not evidence of bad faith, the supreme court will not disturb the conclusion reached.—*Sayre v. Johnson*, 15.

Use by Owner on Leased School Lands.

4. Neither an appropriator of water nor the vendee of such water right need be the owner in fee simple of the land upon which the water is to be used, but may use it upon school land leased from the state.—*Sayre v. Johnson*, 15.

Water Commissioners—Ministerial Officers—Contempt.

5. The Act of 1905, relative to the appointment of commissioners to measure and divide water among persons declared by decree of court to be entitled thereto, and empowering such commissioners to arrest any person interfering with the distribution made by them (Session Laws, 1905, p. 144), does not constitute them judicial officers, in the sense that violations of their orders are contempts committed in the immediate view and presence of the court.—*State ex rel. Flynn v. District Court et al.*, 115.

WITNESSES.

See, also, Evidence.

Expert—Mines—Prospectors.

1. A question asked of a locator of a mining claim, in an action to quiet title to ore bodies, whether a certain shaft had been sunk on the discovery vein, did not call for expert or opinion testimony, so as to bring the witness within a stipulation by which each side agreed to confine itself to a certain number of geological and expert witnesses.—*Hickey et al. v. Anaconda Copper M. Co. et al.*, 46.

Competency—Transactions with Decedents.

2. Under Act of 1897 (Session Laws, 1897, page 245), the assignee of a claim against an estate cannot be a witness in an action against the administrator to recover on the claim.—*Dorais v. Doll et al.*, 314.

Trial—Reception of Evidence—Motion to Strike Out.

3. A motion to strike out the testimony of two witnesses is too broad, where the evidence of one of them was competent for a particular purpose.—*Dorais v. Doll et al.*, 314.

Trial—Action Against Administrator.

4. Section 3162 of the Code of Civil Procedure, as amended by Act of 1897 (Session Laws 1897, p. 245), which provides that parties to an action against an executor or administrator upon a claim against an estate of a deceased person cannot be witnesses, precludes plaintiff, in an action against the administrator of an estate to recover on negotiable paper, from testifying to transactions had with a third person if the proof of such transactions tends to establish plaintiff's claim against the estate.—*Harrington v. Butte & Boston M. Co. et al.*, 330.

Mileage—Costs.

5. While witnesses residing in a county other than where the trial is had, and more than thirty miles from the place where it takes place, may not be compelled to attend, under Code of Civil Procedure, section 3304, still, where they do attend and the court finds that their testimony was necessary, the successful party is entitled to include the amount paid them for mileage in his cost-bill. [*Mr. Justice Holloway, dissenting.*]—*Great Falls Meat Co. v. Jenkins*, 417.

WORDS AND PHRASES.

"Action"—

State ex rel. Carleton v. District Court, 142.

"Action or Proceeding"—

State ex rel. Carleton v. District Court, 142.

"Acquittal"—

State v. Keerl, 516.

"Affiant"—

Dorais v. Doll et al., 317.

"Beneficial"—

Sayre v. Johnson, 19.

"Cases"—

State ex rel. Carleton v. District Court, 40.

"Citizenship"—

Buckley v. McDonald, 488 et seq.

"Claimant"—

Dorais v. Doll et al., 317.

"*Communis error facit jus*"—

State ex rel. Haire v. Rice, 392.

"Compensation"—

Scharrenbroich v. Lewis & Clark County, 257.

"Copies"—

Mont. Ore Pur. Co. v. Boston & Mont. C. & S. M. Co., 402.

"Date of Location"—

Hickey v. Anaconda Copper M. Co., 62.

"Designate"—

State ex rel. Rocky Mt. Bell Tel. Co. v. Mayor etc. of City of Red Lodge, 347.

"Destroy"—

Poindexter & Orr v. Oregon Short Line R. Co., 343.

- "Emolument"—
Scharrenbroich v. Lewis & Clark County, 257, 259.
- "Equal Protection of the Laws"—
State v. Cudahy Packing Co. et al., 185.
- "Fair Trial Law"—
State ex rel. Carleton v. District Court, 149.
- "Grievous"—
Ryan v. Ryan, 412.
- "Indorse in Due Course"—
Harrington v. Butte & B. M. Co. et al., 335.
- "Injury"—
Ryan v. Ryan, 412.
- "Insufficient"—
Pirrie v. Moule et al., 3-6.
- "Jeopardy"—
State v. Keerl, 513.
- "Mileage"—
Scharrenbroich v. Lewis & Clark County, 260.
- "Motion"—
State ex rel. Carleton v. District Court, 143 et seq.
- "New Trial"—
State ex rel. Carleton v. District Court, 150.
- "Or" for "And"—
State ex rel. Hodgdon v. District Court, 121.
- "Proceeding"—
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State ex rel. Lott v. District Court et al., 362.
- "Process"—
State ex rel. Lott v. District Court et al., 362.
- "Property"—
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- "Salary"—
Scharrenbroich v. Lewis & Clark County, 257.
- "Special Proceedings"—
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- "Trial"—
State ex rel. Carleton v. District Court, 146, 153.
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- "Undertaking"—
Pirrie v. Moule et al., 3.
- "Useful"—
Sayre v. Johnson, 19.
- "Writ"—
State ex rel. Lott v. District Court et al., 362.

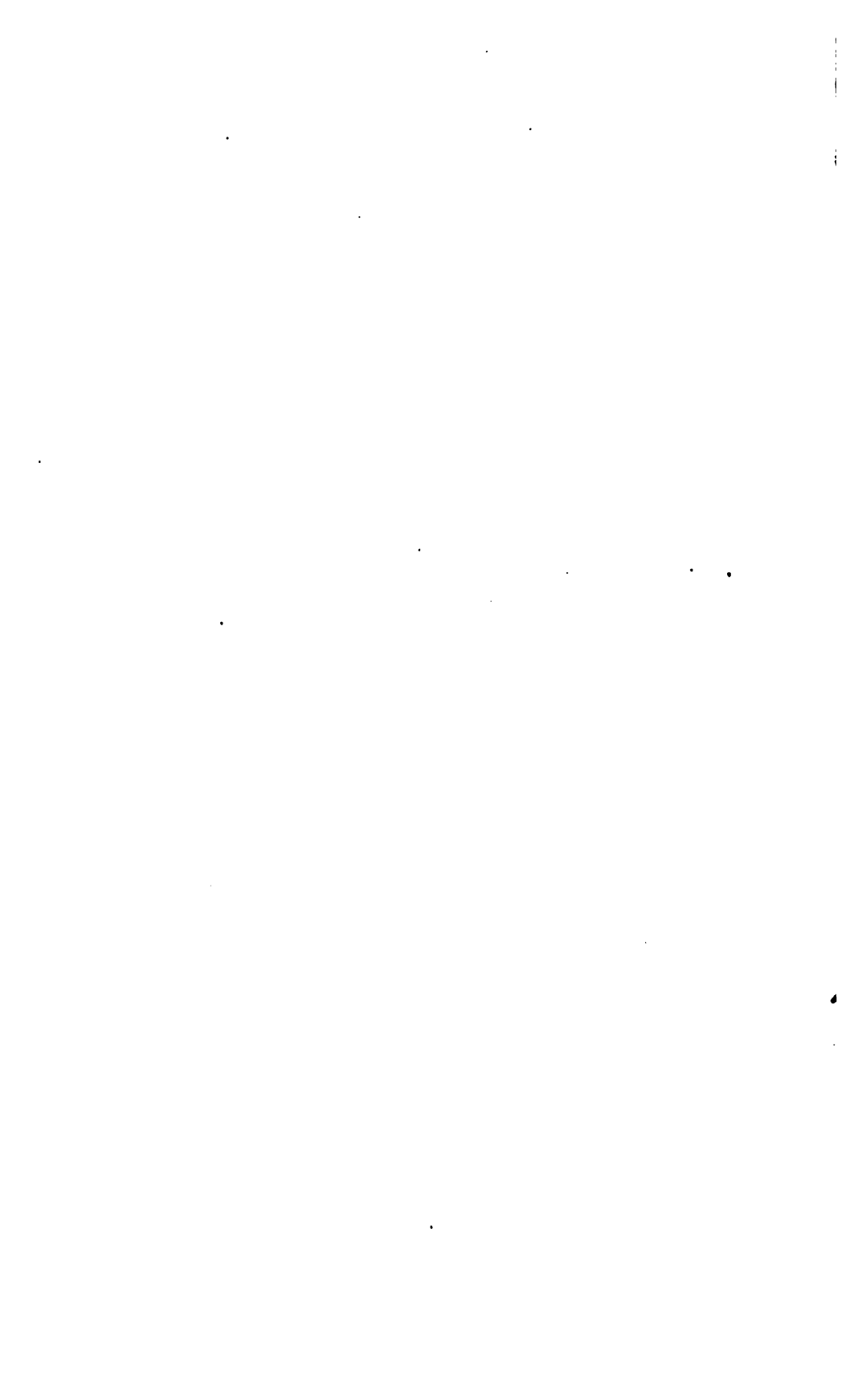


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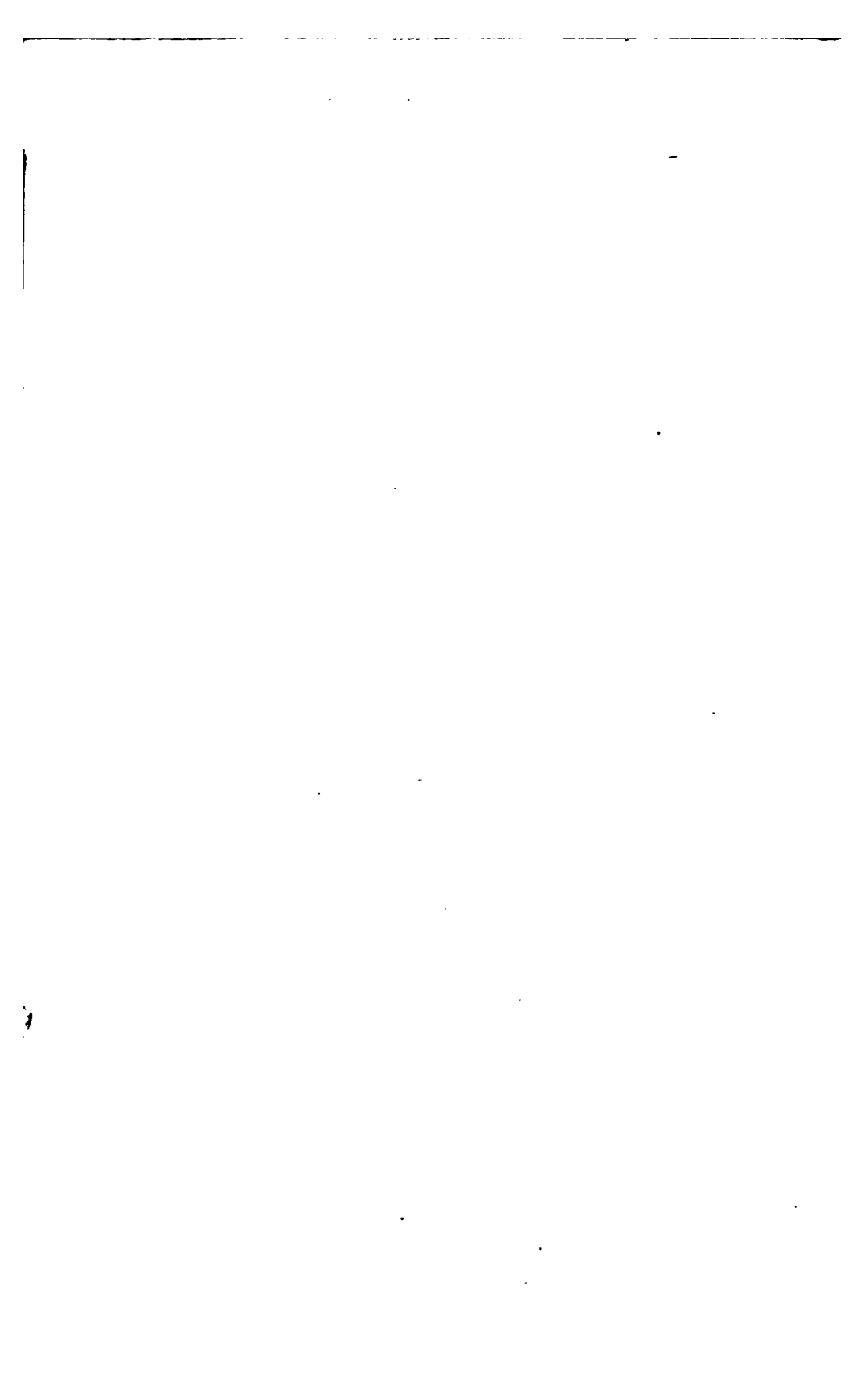
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E. J. A. C.
5/23/07



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